# DOCKET

No. 13-9026

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| Title: | Larry Whitfield, Petitioner |
| | v. |
| | United States |
| Docketed: | March 7, 2014 |
| Lower Ct: | United States Court of Appeals for the Fourth Circuit |
| Case Nos.: | (12-4956) |
| Decision Date: | December 10, 2013 |

**Questions Presented**

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Mar 7 2014 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 7, 2014) |
| Mar 31 2014 | Order extending time to file response to petition to and including May 7, 2014. |
| May 7 2014 | Brief of respondent United States in opposition filed. |
| May 21 2014 | DISTRIBUTED for Conference of June 5, 2014. |
| Jun 9 2014 | DISTRIBUTED for Conference of June 12, 2014. |
| Jun 16 2014 | DISTRIBUTED for Conference of June 19, 2014. |
| Jun 23 2014 | Motion to proceed in forma pauperis and petition for a w rt of certiorari GRANTED. |
| Jul 22 2014 | The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 22, 2014. |
| Jul 22 2014 | The time to file respondent's brief on the merits is extended to and including October 7, 2014. |
| Aug 22 2014 | Joint appendix filed. |
| Aug 22 2014 | Brief of petitioner Larry Whitfield filed. |
| Aug 29 2014 | Brief amicus curiae of National Association of Criminal Defense Lawyers filed. |
| Aug 29 2014 | Brief amicus curiae of The Center on the Administration of Criminal Law filed. |
| Sep 4 2014 | SET FOR ARGUMENT on Tuesday, December 2, 2014. |
| Sep 22 2014 | Record requested from U.S.C.A. 4th Circuit. |
| Sep 23 2014 | Record received from U.S.C.A. 4th Circuit is electronic and located on PACER, part of the record is SEALED. |
| Oct 7 2014 | Brief of respondent the United States filed. |
| Oct 27 2014 | CIRCULATED. |
| Nov 6 2014 | Reply of petitioner Larry Whitfield filed. (Distributed) |
| Dec 2 2014 | Argued. For petitioner: Joshua B. Carpenter, Asheville, N. C. For respondent: Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, D. C. |
| Jan 13 2015 | Adjudged to be AFFIRMED. Scalia, J., delivered the opinion for a unanimous Court. |

Feb 18 2015 JUDGMENT ISSUED.

# PETITION FOR WRIT OF CERTIORARI

13-9026

In The
# Supreme Court of the United States

Supreme Court, U.S.
FILED
MAR - 7 2014
OFFICE OF THE CLERK

LARRY WHITFIELD,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

A conviction under the federal bank robbery statute carries a maximum sentence of 20 years in prison, but no minimum sentence. 18 U.S.C. § 2113(a). If the bank robber forces another person "to accompany him" during the robbery or while in flight, however, that additional offense carries a minimum sentence of ten years in prison and a maximum sentence of life imprisonment. 18 U.S.C. § 2113(e).

The question presented is whether § 2113(e)'s forced-accompaniment offense requires proof of more than a *de minimis* movement of the victim.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Larry Whitfield respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## DECISIONS BELOW

The Fourth Circuit's first opinion in this case is published at 695 F.3d 288 and is reprinted at App. 7a-42a. The district court's sentencing order on remand is unpublished and is reprinted at App. 43a-48a. The Fourth Circuit's second opinion, affirming the sentence imposed on remand, is unpublished and is reprinted at App. 1a-6a.

## JURISDICTION

The judgment of the court of appeals was entered on August 22, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISION

18 U.S.C. § 2113 provides, in relevant part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--

> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.
>
> (e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

## STATEMENT OF THE CASE

The courts of appeals have reached conflicting opinions about the scope of § 2113(e)'s forced-accompaniment offense. The Fifth and Tenth Circuits have held that the forced-accompaniment offense requires proof of more than a *de minimis* movement of the victim. The Ninth Circuit has held that "substantial" movement of the victim is not required, but it reserved judgment on whether a *de minimis* threshold might apply. The Fourth Circuit held in this case, consistent with a prior Eleventh Circuit decision, that nothing more than *de minimis* movement of the victim is required.

The Court should use this case to resolve that conflict and provide a uniform interpretation of an important and frequently applied federal criminal statute.

1. In September 2008, Petitioner Larry Whitfield was 20 years old and had no criminal record. His mother was serving in the military overseas, leaving

Whitfield alone to care for himself and his younger brother. Overwhelmed by the financial burdens imposed by his family responsibilities, Whitfield decided—together with Quanterrious McCoy—to rob a credit union in Gastonia, North Carolina. As they attempted to enter the credit union, however, a metal detector triggered an automatic lock on the inner doors, preventing their entry. This prompted Whitfield and McCoy to flee by car. McCoy eventually lost control of the car and got stuck in a median. At this point the two men fled on foot into the woods, discarded two firearms, and separated from one another.

Now unarmed, Whitfield first hid in the home of Tina Walden, who was away at work. Whitfield confronted Walden at the front door when she returned, causing her to flee. Whitfield fled as well and next entered the unlocked home of Mary and Herman Parnell.

Mrs. Parnell, a 79-year-old woman with heart disease and high blood pressure, was at home but not in the room where Whitfield entered. Once inside the Parnell home, Whitfield sent a text message to a friend, Tamecia Sanders, who agreed to pick him up. During a subsequent phone call between Whitfield and Sanders, Mrs. Parnell came from the hallway and saw Whitfield for the first time. Mrs. Parnell was frightened, but Whitfield—who was still unarmed—said to her, "Ma'am, just calm down. I'm probably more scared than you are, and I'm actually just trying to leave." CAJA 673.[1]

Mrs. Parnell subsequently spoke to Sanders on the phone to provide directions to the Parnell home so that she could come get Whitfield. According to

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[1] CAJA refers to the Joint Appendix filed in the court of appeals.

Sanders, Mrs. Parnell "sounded calm" and was "relieved" that Sanders was nearby. CAJA 751. Sanders, however, was ultimately unable to reach the Parnell home because the police had blocked it off.

While Whitfield was still on the phone with Sanders, Mrs. Parnell developed difficulty breathing. Sanders overheard Whitfield ask Mrs. Parnell if he could get her a glass of water or any medicine. Whitfield later informed Sanders that it appeared Mrs. Parnell had stopped breathing and seemed unconscious, but he was too scared to go into the room to check on her. Whitfield then began crying on the phone.

A few minutes later Whitfield ended his call with Sanders when he heard someone knocking on the front door. He ran from the house and hid in the woods, where he was ultimately apprehended. Mrs. Parnell was later found dead in a chair in the computer room of her home, having suffered a heart attack.

During extensive questioning by the police Whitfield signed several statements confessing to the attempted robbery and the subsequent home break-ins. In one of those statements Whitfield admitted that he "asked [Mrs. Parnell] to go into the computer room." CAJA 1280.

2. A grand jury in the Western District of North Carolina indicted Whitfield on four charges. The first three alleged (1) attempted bank robbery in violation of 18 U.S.C. § 2113(a) (Count One), (2) conspiracy to use a firearm during the attempted robbery in violation of 18 U.S.C. §§ 924(c) & (o) (Count Two); and (3) carrying a firearm during the attempted robbery in violation of 18 U.S.C.

§ 924(c) (Count Three). The fourth, and most serious, charge alleged that while trying to avoid apprehension for the attempted bank robbery, Whitfield "forced [Mrs. Parnell] to accompany him without her consent, and killed [her]," in violation of 18 U.S.C. § 2113(e) (Count Four). CAJA 14.

Despite prosecuting Whitfield under § 2113(e), the government never alleged that he touched or threatened Mrs. Parnell. At trial it sought to prove the "killed" offense with expert testimony that Whitfield's presence in Mrs. Parnell's home caused a fatal cardiac arrhythmia. It sought to prove "forced accompaniment" with two separate theories: that Whitfield guided Mrs. Parnell to the computer room, and that he confined Mrs. Parnell to her home. CAJA 248 (Opening Statement), 1202 (Closing Argument).

At trial the district court utilized a special verdict form on Count Four. It asked the jury to decide (1) whether Whitfield killed Mrs. Parnell; (2) whether he forced her to accompany him; and, (3) if yes as to (2), whether the forced accompaniment resulted in Mrs. Parnell's death. CAJA 1340.

The court's instructions on Count Four included no minimum limit on the degree of accompaniment necessary to establish the forced- accompaniment offense. Instead, the court instructed the jury that "accompaniment" includes "forcing a person to move from one part of a building to another against her will." CAJA 1242. The court noted that the government did not need to show "that the defendant crossed a property line, moved a person a particular number of feet, held the person

for a particular period of time, or placed the person at a certain level of danger." CAJA 1242-43.

Following trial the jury found Whitfield guilty of Counts One through Three. On Count Four, it found Whitfield not guilty of killing Mrs. Parnell but guilty of "forced accompaniment result[ing] in [her] death." CAJA 1340.

Throughout the trial Whitfield repeatedly, and unsuccessfully, moved under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal on Count Four. CAJA 1084-87 (close of Government's evidence); CAJA 1165 (close of defense evidence); CAJA 1274-75 (following jury verdict). He argued, among other things, that there was insufficient evidence "that Mr. Whitfield forced Ms. Parnell to accompany him anywhere." CAJA 1087.

3. The district court sentenced Whitfield on November 10, 2010. The court imposed a sentence of life imprisonment on Count Four, concurrent 240-month sentences on Counts One and Two, and a consecutive 60-month sentence on Count Three.

4. On appeal, Whitfield advanced several arguments challenging his conviction. As relevant here, Whitfield noted the circuit conflict regarding the scope of § 2113(e) and argued that the Government had failed to prove facts sufficient to establish a forced accompaniment. The Fourth Circuit disagreed. It acknowledged that "Whitfield required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period." App. 41a. But the court held that "nothing more is required" to establish a violation of § 2113(e). App. 41a.

Although it thus affirmed the basic forced-accompaniment conviction, the court vacated Whitfield's conviction for the additional death-results offense. It reasoned that the "death results" terminology in § 2113(e) prescribes an element of a separate offense rather than a sentencing factor. App. 34a-35a. Because Count Four of the indictment charged a killing offense and a forced-accompaniment offense, but not a death-results offense, the court held that the district court violated the Grand Jury Clause by instructing the jury on the uncharged death-results offense. App. 33a-40a. The court thus vacated the death-results conviction and remanded to the district court for resentencing on the remaining Count Four conviction for forced accompaniment. App. 40a.

5. On October 31, 2012, the district court resentenced Whitfield on Count Four to a sentence of 264 months in prison. The court entered its final judgment on November 20, 2012, and Whitfield timely filed a notice of appeal on November 26, 2012.

6. On November 20, 2012, Whitfield filed a petition for certiorari asking this Court to review the Fourth Circuit's initial, published decision. In response, the government argued (among other things) that the case's interlocutory posture—given the pendency of the appeal from the sentence imposed on remand—"alone furnishe[s] sufficient ground for the denial of" the petition. Brief for the United States in Opposition at 8, *United States v. Whitfield*, No. 12-7374 (January 22, 2013) (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). The government acknowledged that Whitfield could re-raise his claim after

the Fourth Circuit decided the appeal arising from his resentencing. *Id.* at 8-9 (citing *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (observing that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment)). On February 25, 2013, this Court denied Whitfield's petition for certiorari.

7. On December 10, 2013, the Fourth Circuit issued an unpublished, per curiam opinion affirming the sentence imposed by the district court on remand. App. 1a-6a.

## REASONS FOR GRANTING THE WRIT

### I. The Fourth Circuit's Decision Deepens A Conflict Among The Circuit Courts Regarding The Proper Interpretation Of 18 U.S.C. § 2113(e).

This case presents a legal issue—the proper construction of § 2113(e)'s forced-accompaniment offense—that has vexed the federal courts. Five circuit courts have addressed the issue, resulting in three conflicting interpretations of the statute.

#### A. The Fifth And Tenth Circuits Have Interpreted § 2113(e)'s Forced-Accompaniment Offense Narrowly By Requiring More Than A *De Minimis* Movement of the Victim.

The Tenth Circuit first addressed the scope of § 2113(e) in *United States v. Marx*, 485 F.2d 1179 (10th Cir. 1973). In that case the defendants assaulted a bank president (Mr. Adams) on his morning run and forced their way into his home. *Id.* at 1181-82. From there the defendants ordered Mr. Adams to take a forged cashier's check (for $49,500) to the bank, negotiate it for cash, and leave the cash in a parking lot. *Id.* at 1182. To ensure compliance with this scheme, the defendants

strapped a bomb to Mr. Adams's left side and placed a second bomb under a bed where they tied up Mrs. Adams and her two children. *Id.*

The defendants were convicted on several charges under 18 U.S.C. § 2113, including a forced-accompaniment charge under § 2113(e). The Government's theory for the forced-accompaniment charge was two-fold: first, that the defendants had forced Mr. Adams to accompany them into his home; and second, that they had forced Mrs. Adams and the children to accompany them into the bedroom. *Id.* at 1185-86.

The defendants challenged their forced-accompaniment convictions on appeal. They argued that "accompany"—as used in § 2113(e)—"connotes a physical juxtaposition among the participants and a sense of movement or travel." *Id.* at 1186. And they argued that "although Adams and his family were somewhat contained in their activities, they were never physically traveling with either [defendant]." *Id.*

The Tenth Circuit agreed with the defendants' construction of § 2113(e) and reversed their forced-accompaniment convictions. Aside from relying on the plain meaning of "accompany," the court construed § 2113(e) in light of its purpose of "combat[ting] the multitude of murders and kidnappings occurring during attempts by bank robbers to flee the scene of the crime." *Id.* The court therefore concluded that "more is required [to violate § 2113(e)] than forcing Adams to enter his own house or forcing the Adams family to move from the den to a bedroom." *Id.*

The Fifth Circuit adopted a similar construction of § 2113(e) in *United States v. Reed*, 26 F.3d 523 (5th Cir. 1994). There the defendant approached a credit-union employee at gunpoint outside the rear entrance to the credit union. *Id.* The defendant forced the employee to open the door, enter the credit union with him, and give him money from the vault. *Id.*

On appeal, the Fifth Circuit observed that the scope of the phrase "to accompany him" in § 2113(e) was an issue of first impression in the circuit. *Id.* at 526. Like the Tenth Circuit, the court concluded that *de minimis* movement of the victim—such as the movement of a bank employee within the bank—was insufficient to sustain a forced-accompaniment conviction. *Id.* at 527. The court reasoned that considering "such circumstances [as] an aggravating accompaniment would likely convert numerous ordinary bank robberies to aggravated bank robberies with only the faintest of distinctions between accompanied, *i.e.*, aggravated, and non-accompanied, non-aggravated bank robbers." *Id.* at 528.

In its decision, the Fifth Circuit approvingly cited a district court case holding that § 2113(e) "requires a not insubstantial asportation of the victim." *Id.* at 527 n.4 (citing *United States v. Sanchez*, 782 F. Supp. 94 (C.D. Cal. 1992) (Tashima, J.)). The court further explained that the "substantiality of the asportation, although there can be no bright line, should be measured by duration, distance and any change in environment tending to increase the danger to which the victim is exposed, other than any danger inherent in the underlying offense." *Id.* (quoting *Sanchez*, 782 F. Supp. at 97).

The Fifth Circuit concluded that the accompaniment in question satisfied this standard. It reasoned that "moving the victim as a hostage into the bank" from the outside exceeded the forced-accompaniment threshold, just as "moving her out of the bank as a hostage would have." *Id.* at 528. Although the defendant's actions were enough to show "accompaniment" under § 2113(e), the *Reed* decision's construction of the statute to require more than *de minimis* movement still binds federal courts in the Fifth Circuit. *See Rios v. City of Del Rio*, 444 F.3d 417, 425 n.8 (5th Cir. 2006) ("[A] prior panel's explication of the rules of law governing its holdings may not generally be disregarded as dictum.").

### B. A Divided Panel Of The Ninth Circuit Rejected A "Substantiality Analysis" Under § 2113(e), But Reserved Judgment On Whether To Apply A *De Minimis* Threshold.

The Ninth Circuit addressed the scope of § 2113(e) in *United States v. Strobehn*, 421 F.3d 1017 (9th Cir. 2005). The defendant there confronted a security guard at gunpoint in a bank parking lot and forced him to enter the bank and lie face down on the floor while the defendant robbed the bank. *Id.* at 1018.

On appeal, the panel majority expressly declined to adopt the "substantiality analysis" from cases such as *Marx* and *Sanchez*. It reasoned that, despite these decisions interpreting § 2113(e) to require a "substantial" accompaniment, "[t]he statute has no such qualifying language." *Id.* at 1019. Nonetheless, the majority stopped short of holding that § 2113(e) would apply even where the accompaniment was *de minimis*. *Id.* at 1020 n.1 ("We do not decide whether less substantial movement would suffice in a different case. Contrary to the dissent's

understanding, we do not hold that '§ 2113(e) 'plainly' applies to *any* forced accompaniment, no matter how slight.'"). Instead, it held that the defendant's actions in forcing the security guard to "walk a non-trivial distance" and enter the bank from the parking lot surpassed any *de minimis* threshold. *Id.* at 1020 & n.1.[2]

Judge Fletcher dissented. She reasoned that "the meaning of § 2113(e) is not as 'plain' as the majority would have it." *Id.* at 1023. Rather, she noted, the statutory text is "actually silent regarding the requisite degree of forced accompaniment." *Id.* The court was thus required to determine, using the tools of statutory interpretation, whether the statute "reach[es] 'any,' 'more than *de minimis*,' or 'substantial' forced accompaniment." *Id.* at 1023 n.1.

Judge Fletcher first interpreted the forced-accompaniment language in light of the remainder of § 2113(e). She observed that "§ 2113(e) imposes the same minimum punishment for forced accompaniment without consent as it imposes for homicide, which suggests that 'forced accompaniment' must refer to conduct that is comparable in degree of culpability to homicide." *Id.* at 1024.

This reading of "forced accompaniment," she wrote, was reinforced by the broader context of § 2113. That statute "creates a scale of increasingly serious crimes and corresponding increasingly severe penalties." *Id.* As a result, "[t]he fact that subsection (e) prescribes a substantially more severe punishment for bank robbery than subsection (d)"—which enhances a bank robbery sentence for "assault,

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[2] The Seventh Circuit affirmed a § 2113(e) conviction under similar facts in *United States v. Davis*, 48 F.3d 277, 279 (7th Cir. 1995) (defendant "forced [a credit union employee], at gunpoint, to go from the parking lot into the credit union"). The court affirmed the conviction on the facts without addressing whether § 2113(e) would apply to a case involving a lesser movement of the victim. *Id.* at 278-79.

endangerment of a life, or use of a dangerous weapon"—suggests that § 2113(e) "reach[es] conduct substantially more egregious than that which is reached by subsection (d)." *Id.* at 1024-25.

Finally, Judge Fletcher observed that "[t]he legislative history and purpose of § 2113(e) confirms what is evident from reading the provision in context." *Id.* at 1025. Congress, she concluded, did not intend "to authorize such a severe penalty enhancement for insubstantial asportation or forced movement inherent to the underlying crime." *Id.* at 1025-26.

Based on her interpretation of § 2113(e), Judge Fletcher would have applied the substantiality analysis employed by the *Sanchez* court. She concluded that the facts of the case, which included "forced movement across a bank's threshold," did not satisfy this standard. *Id.* at 1026-27.

### C. The Fourth Circuit And The Eleventh Circuit Have Interpreted § 2113(e)'s Forced-Accompaniment Offense Broadly To Encompass Even *De Minimis* Movement Of The Victim.

The Eleventh Circuit was the first appeals court to reject any limit on the degree of accompaniment required under § 2113(e). In *United States v. Bauer*, 956 F.2d 239 (11th Cir. 1992), the court addressed a case in which the defendant was convicted of a forced-accompaniment offense because during an attempted bank robbery he had forced two women at gunpoint "to accompany him from the back of the bank to the front door." *Id.* at 241. On appeal, the Eleventh Circuit interpreted § 2113(e) expansively:

> There is no requirement [under § 2113(e)] that the government prove that the defendant crossed a property line. Nor does the statute

> require that the hostages traverse a particular number of feet, that the hostages be held against their will for a particular time period, or that the hostages be placed in a certain quantum of danger.

*Id.* Applying this standard the court affirmed the § 2113(e) conviction even though the entire "accompaniment" occurred inside the bank. *Id.* at 241-42.

The Fourth Circuit first adopted *Bauer*'s broad interpretation of § 2113(e) in *United States v. Turner*, 389 F.3d 111 (4th Cir. 2004). The defendant in that case entered a bank with a gun tucked in his belt and ordered the bank manager to lead him from her desk to the vault, where he had her fill a pillowcase with money. *Id.* at 114. On appeal, the court expressly relied on *Bauer* in affirming the defendant's § 2113(e) conviction. *Id.* at 119-20. The court purported to base its holding on the "plain terms" of the statute, which the court said "include[ ] no property-line or threshold requirement." *Id.* at 119.

The Fourth Circuit applied *Turner* in this case to an even more *de minimis* accompaniment. As the court acknowledged, "Whitfield required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period." App. 41a. Citing *Turner*, however, the court held that "nothing more is required." *Id.* at 41a.

* * *

This Court should resolve the entrenched conflict among the circuits and provide a uniform interpretation of § 2113(e).

## II. The Question Presented Is Important And Likely To Arise Frequently.

The proper interpretation of § 2113(e) is an important and recurring issue. Federal bank robberies, unfortunately, are an all-too-common occurrence, making § 2113 cases a staple of the federal criminal docket. In 2011, for example, there were more than 5,000 federal bank robberies that violated § 2113, according to FBI statistics. *See* FBI Bank Crime Statistics, Federally Insured Financial Institutions (January 1, 2011 – December 31, 2011), *available at* http://www.fbi.gov/stats-services/publications/bank-crime-statistics-2011/bank-crime-statistics-2011. Not surprisingly, many of these reported robberies yield federal prosecutions. The Sentencing Commission reported more than 3,200 cases sentenced pursuant to the Robbery Guideline (U.S.S.G. § 2B3.1) in 2012, accounting for 4.1% of all cases. *See* Use of Guidelines and Specific Offense Characteristics (Fiscal Year 2011), at p. 16, available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2012/Use_of_Guidelines_and_Specific_Offense_Characteristics_Guideline_Calculation_Based.pdf.[3]

Besides its direct impact on defendants convicted of a forced-accompaniment offense, the Fourth Circuit's interpretation of § 2113(e) will spill over to every case prosecuted under § 2113. Given the low threshold required to establish an "accompaniment" under the Fourth Circuit's interpretation, prosecutors will have wide discretion to add a § 2113(e) charge in nearly every case indicted under

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[3] The Robbery Guideline covers bank robberies as well as other types of robberies. Although the Sentencing Commission does not break down its statistics by type of robbery, the statistics show that more than 53% of the cases sentenced under the Robbery Guideline in 2012 involved property stolen from a financial institution or post office. *Id.*

§ 2113(a). Because bank robbery cases generally involve perpetrators giving orders to victims, and those orders generally require victims to move from one location to another inside a bank, defendants in mine-run bank robbery cases in the Fourth Circuit will find themselves facing § 2113(e)'s greatly enhanced penalties—a mandatory minimum of ten years and a maximum of life imprisonment. By contrast, defendants who engage in the same conduct in the Fifth and Tenth Circuits (and in any other Circuit that ultimately rejects the Fourth Circuit's interpretation) will face much lighter penalties under § 2113(a)—a statutory maximum of twenty years with no statutory minimum.

The looming specter of § 2113(e)'s harsh penalties will have a significant and coercive effect during plea bargaining. As this Court has recently observed, 97% of federal convictions are the result of guilty pleas. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Plea bargaining thus "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id.* (citation omitted; emphasis in original). In a system where "horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long" (*id.*), the Fourth Circuit's expansive interpretation of § 2113(e) will have a deleterious impact in a wide swath of bank robbery cases.

Even more troubling, that impact will be largely invisible to the courts because it will manifest itself through the increased pressure on defendants to plead guilty to a lesser § 2113 offense rather than risk challenging an unjustified § 2113(e) charge at trial. In other words, the Fourth Circuit's erroneously broad

interpretation of § 2113(e) is likely to produce *more* prosecutorial over-charging and *fewer* published decisions that address the provision's scope.

## III. The Fourth Circuit's Construction Of § 2113(e) Is Wrong.

The Fourth Circuit's conclusion—that § 2113(e) requires only a *de minimis* movement of the victim—violates fundamental principles of statutory interpretation and is wrong.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). This inquiry "must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* (internal quotation marks omitted). In determining "[t]he plainness or ambiguity of statutory language," courts must consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341; *see Holloway v. United States*, 526 U.S. 1, 7 (1999) ("[T]he meaning of statutory language, plain or not, depends on context.").

Applying these standards, the key statutory phrase—"to accompany him"—is ambiguous. The term by its plain meaning "connotes a sense of movement or travel." *Marx*, 485 F.2d at 1186; *see also* Oxford English Dictionary Third Edition (Dec. 2011) (defining "accompany" as "To go with (a person) as a companion, escort, or attendant."). But the term, and the remainder of the statute, is silent as to the amount of "movement or travel" required.

The Fourth Circuit erred by resolving this ambiguity in favor of a broad interpretation that encompasses *de minimis* movement. That construction fails in light of the full statutory context. *See Robinson*, 519 U.S. at 341 (observing that the statutory term "employees" appeared "[a]t first blush" to refer only to current employees, but holding that "[t]his initial impression does not withstand scrutiny in the context of [the entire statutory provision]"); *Smith v. United States*, 508 U.S. 223, 233 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute.").

Viewed as a whole, § 2113 creates a series of escalating penalties applicable to increasingly culpable conduct. Subsection (a) defines the basic bank-robbery offense and sets a 20-year statutory maximum. Subsection (d) increases the maximum to 25 years for an aggravated offense where the bank robber "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." Finally, subsection (e) imposes the most serious penalties, setting a ten-year mandatory minimum and a maximum of life for offenses that involve forced accompaniment of another person, along with a mandatory minimum of life if the victim dies as a result of the forced accompaniment or is killed.

The logic of this tiered penalty scheme disintegrates under the Fourth Circuit's holding. Although subsection (e) carries the most serious penalties—and is thus aimed at the most culpable conduct—the Fourth Circuit's interpretation broadens it to cover conduct present in nearly all bank robberies, such as directing a bank employee's movement within the bank. As a result, the more serious penalties

for "forced accompaniment" will apply in a broad swath of mine-run bank robberies where the less severe penalties of subsection (d) would not apply.

This case is a good example. The conduct underlying the subsection (e) charge—Whitfield's interaction with Mrs. Parnell—would not have triggered the increased 25-year maximum under subsection (d) because Whitfield was unarmed and did not commit assault. Yet he is subject to the harsher penalties imposed by subsection (e) under the Fourth Circuit's erroneous interpretation of that provision.

These absurd results need not be tolerated. The Fifth and Tenth Circuits have properly interpreted § 2113(e)'s ambiguous language to require more than a *de minimis* movement of the victim. This interpretation is faithful to the text of § 2113(e) while also maintaining the integrity of the overall penalty scheme created by § 2113.

Finally, even if context did not mandate this interpretation of § 2113(e), the rule of lenity would. *See United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.").

## IV This Case Is An Ideal Vehicle For Resolving The Scope Of § 2113(e)'s Forced-Accompaniment Offense.

Whitfield's case presents an ideal vehicle for this Court to resolve the question presented for at least three reasons. First, the issue has been preserved and litigated in the proceedings below. In the district court Whitfield repeatedly moved under Rule 29 for a judgment of acquittal on the § 2113(e) charge. Whitfield continued to pursue this issue on appeal, arguing that the evidence was insufficient

under the interpretation of "forced accompaniment" adopted by the Fifth and Tenth Circuits.

Second, the Court's decision on the legal question presented will be dispositive since there is no factual dispute that could affect the outcome. The Fourth Circuit's opinion makes clear that, even viewed in the light most favorable to the Government, Whitfield did nothing more than guide Mrs. Parnell from one room of her own home to another. App. 41a ("Whitfield required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period."). Indeed, the movement of Mrs. Parnell was so *de minimis* that the Government's own press release described this as a case of "confinement" rather than "accompaniment."[4] Thus, if this Court agrees with the Fifth and Tenth Circuits that § 2113(e) requires more than *de minimis* movement of the victim, it is clear that Whitfield's § 2113(e) conviction must be reversed under that standard.

Third, proper resolution of this issue will have a dramatic impact on Whitfield's overall sentence. As an initial matter, the forced-accompaniment conviction carries a ten-year mandatory minimum sentence, whereas the convictions on Count One and Count Two do not have any mandatory minimum. Moreover, because of its seriousness, a § 2113(e) conviction is treated more severely under the Guidelines than an ordinary bank robbery conviction under § 2113(a). As a result, Whitfield was sentenced (and resentenced) based on an advisory

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[4] *See* Press Release, Charlotte Man Convicted by Federal Jury on Crimes Related to September 2008 Gastonia Bank Robbery Attempt: Jury Also Finds Gastonia Womans [sic] Death Resulted From *Forced Confinement* During Escape, *available at* http://www.fbi.gov/charlotte/press-releases/2009/ce112009-1.htm (Joint Press Release of FBI and U.S. Attorney's Office) (emphasis added).

Guidelines range of life imprisonment. Absent the § 2113(e) conviction, however, the advisory range for Counts One and Two would have been only 70 to 87 months.[5]

## CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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[5] This range is calculated based on the presentence report, which found that the total offense level for Count One (attempted bank robbery) and Count Two (firearms conspiracy) was 27. CAJA 1671. Combined with Whitfield's criminal history category of I, this offense level yields a Guidelines range of 70 to 87 months. Count Three (firearms) is treated separately and requires a 60-month consecutive sentence. CAJA 1672, 1676.

# OPPOSITION BRIEF

ORIGINAL

No. 13-9026

IN THE SUPREME COURT OF THE UNITED STATES

LARRY WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether, following petitioner's attempted bank robbery, his actions in directing an elderly woman during a home invasion to enter a room in her residence where they would not be seen by the police constituted "forc[ing] any person to accompany [petitioner] without the consent of such person" within the meaning of 18 U.S.C. 2113(e)

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted in 548 Fed. Appx. 70. A prior opinion of the court of appeals (Pet. App. 7a-42a) is reported at 695 F.3d 288.

## JURISDICTION

The judgment of the court of appeals was entered on December 10, 2013. The petition for a writ of certiorari was filed on March 7, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

## STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of attempted bank robbery, in violation of 18 U.S.C. 2113(a) (Count One); conspiring to carry a firearm during an attempted bank robbery, in violation of 18 U.S.C. 924(o) (Count Two); carrying a firearm during an attempted bank robbery, in violation of 18 U.S.C. 924(c) (Count Three); and forceful accompaniment while attempting to avoid apprehension for an attempted bank robbery resulting in death, in violation of 18 U.S.C. 2113(e) (Count Four) He was sentenced to life imprisonment on Count Four; 240 months of imprisonment on Counts One and Two; and a consecutive term of 60 months of imprisonment on Count Three -- to be followed by five years of supervised release on Counts Three and Four and three years on Counts One and Two. The court of appeals affirmed in part, vacated in part, and remanded for resentencing on Count Four. Pet. App. 7a-42a. Petitioner sought certiorari and this Court denied the petition. 133 S. Ct. 1461 (2013) (No. 12-7374)

On remand, the district court resentenced petitioner to 264 months of imprisonment on Count Four, to be followed by five years of supervised release. Pet. App. 44a-45a. The court of appeals affirmed. Id. at 1a-5a.

1. In September 2008, petitioner and Quanterrious McCoy, armed with a handgun and an assault rifle, entered the lobby of a

credit union in Gastonia, North Carolina. A metal detector triggered an automatic locking mechanism and prevented them from proceeding further. Petitioner and McCoy then fled in their car, with police officers in pursuit, until they got stuck in the highway's median. At that point, they fled on foot into the woods, discarded their firearms, and separated from each other Pet. App. 9a.

Petitioner headed to the home of Tina Walden and forcibly entered the house. When Walden returned home from work, she noticed that the lock was jammed and saw a footprint on the door As she attempted to call her husband, petitioner appeared, brandishing a knife, and told her to "shut up and come in." Walden instead ran away, and petitioner escaped to the nearby home of Herman and Mary Parnell. He entered the Parnell residence through an unlocked front door Mrs. Parnell, a 79-year-old woman, was home alone and began to cry. Petitioner directed her into the computer room where they could not be seen by the police. Petitioner eventually fled from the Parnell home and was arrested soon thereafter. When Mr. Parnell returned home, he found his wife sitting in a chair in the computer room, dead from a heart attack. Pet. App. 9a-11a.

2. A federal grand jury returned an indictment charging petitioner with attempted bank robbery, in violation of 18 U.S.C. 2113(a) (Count One); conspiring to carry a firearm during an

attempted bank robbery, in violation of 18 U.S.C. 924(o) (Count Two); and carrying a firearm during and in relation to an attempted bank robbery, in violation of 18 U.S.C. 924(c) (Count Three) Pet. App. 11a. Petitioner was also charged with "forc[ing Mrs. Parnell] to accompany him without her consent, and kill[ing her]" while attempting to avoid apprehension for the attempted bank robbery, in violation of 18 U.S.C. 2113(e) (Count Four) Pet. App. 12a (citation omitted)

After the close of the government's case, petitioner moved for a judgment of acquittal on Count Four. Petitioner argued, among other things, that the evidence was insufficient to prove that he had "forced Mrs. Parnell to accompany him anywhere." Pet. App. 20a (citation omitted) The district court denied the motion. Ibid. At the close of all the evidence, petitioner renewed his motion for a judgment of acquittal on Count Four, which the district court again denied. Id. at 21a.

The district court instructed the jury that, in order to find petitioner guilty on Count Four, it was required to find, beyond a reasonable doubt, that petitioner committed the attempted robbery of the credit union alleged in Count One and that, in avoiding apprehension for that offense, petitioner either killed Mrs. Parnell or knowingly forced her to accompany him without her consent. Pet. App. 21a. The court also instructed the jury that if it found that petitioner "forced [Mrs.] Parnell to accompany

him, [it] must also decide whether that forced accompaniment resulted in [her] death." Ibid. (emphasis omitted) The court further instructed the jury that "'the term "forced accompaniment" includes[] forcing a person to move from one part of a building to another against her will,' and 'does not require [the government to show] that the defendant crossed a property line, moved a person a particular number of feet, held a person for a particular period of time, or placed the person at a certain level of danger.'" Id. at 22a (citation omitted; first brackets in original)

The jury found petitioner guilty on all four counts. On Count Four, the jury found that petitioner was not guilty of killing Mrs. Parnell, but was guilty of forcing her to accompany him in an attempt to avoid apprehension, and that the forced accompaniment resulted in her death. Pet. App. 22a-23a. A forced-accompaniment offense is punishable by a ten-year mandatory minimum prison term, but if the forced accompaniment results in death the punishment is death or life imprisonment. 18 U.S.C. 2113(e) The district court sentenced petitioner to life imprisonment on Count Four (as required by statute); 240 months of imprisonment on Counts One and Two; and a consecutive term of 60 months of imprisonment on Count Three -- to be followed by five years of supervised release on Counts Three and Four and three years on Counts One and Two. Pet. App. 23a.

3. The court of appeals affirmed in part, vacated in part, and remanded for resentencing on Count Four Pet. App. 7a-42a.

As relevant here, the court of appeals rejected petitioner's contention that the evidence was insufficient for the jury to find that he forced Mrs. Parnell to accompany him without her consent, in violation of 18 U.S.C. 2113(e) Pet. App. 40a-41a. Petitioner argued that "the prosecution failed to produce any evidence that he had threatened Mrs. Parnell as a means of forcing her to accompany him and, in the light most favorable to the government, established only that he had 'guided' or 'asked' her to go into the computer room." Id. at 40a. The court was "entirely unpersuaded" by this argument and "decline[d] to accept that an ostensible 'request' by a physically agile twenty-year-old male attempting to evade apprehension for an attempted bank robbery constitutes anything less than a real threat, particularly when aimed at a fragile seventy-nine-year-old woman during a terrifying invasion of her home." Id. at 40a-41a. The court explained that "there was ample evidence that [petitioner] wanted to position Mrs. Parnell in the computer room where they could not be seen by the police"; that petitioner had "admitted that he directed Mrs. Parnell to the computer room"; and that "when she attempted to defy his instructions by insisting that he leave the home, [petitioner] required Mrs. Parnell to stay in the computer room, at which point

'she sat down in the chair,' where she was found dead." Id. at 41a (citation omitted)

The court of appeals acknowledged that petitioner "required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period," but concluded that "no more is required to prove that a forced accompaniment occurred." Pet. App. 41a (citing United States v. Turner, 389 F.3d 111, 119-120 (4th Cir 2004), cert. denied, 544 U.S. 935 (2005)) As the court explained, its "interpretation of a forced accompaniment comports with the decisions of [its] sister circuits." Id. at 41a n.20 (citing United States v Strobehn, 421 F.3d 1017. 1020 (9th Cir. 2005), cert. denied, 547 U.S. 1005 (2006); United States v. Reed, 26 F.3d 523, 527 (5th Cir. 1994), cert. denied, 513 U.S. 1157 (1995); United States v Bauer, 956 F.2d 239, 241 (11th Cir.), cert. denied, 506 U.S. 976 (1992))

The court of appeals, however, held that petitioner had been convicted and sentenced for an offense not charged in the indictment, namely a forced accompaniment resulting in death. Pet. App. 33a-40a. The court explained that, in its view, Section 2113(e) encompasses three separate offenses: a killing offense, a forced-accompaniment offense, and a forced accompaniment resulting in death offense. Id. at 11a-12a, 35a. Because the indictment alleged only the killing offense and the forced-accompaniment offense, the court vacated petitioner's conviction of the "death

results" offense, which carried with it a mandatory life sentence, and remanded for resentencing on Count Four. Id. at 39a-40a.

4. Petitioner sought certiorari, contending that Section 2113(e)'s forced-accompaniment offense requires more than de minimis movement of the victim and that the courts of appeals are divided on that question. This Court denied the petition. See 133 S. Ct. 1461 (2013) (No. 12-7374)

5. Meanwhile, on remand, the district court issued an amended judgment after resentencing petitioner to 264 months of imprisonment on Count Four, to be followed by five years of supervised release. Pet. App. 43a-49a.

6. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1a-5a. Petitioner raised four challenges to his revised sentence and the court of appeals rejected each challenge. Ibid.

## ARGUMENT

Petitioner renews his contention (Pet. 8-21) that Section 2113(e)'s forced-accompaniment offense requires more than de minimis movement of the victim and that the courts of appeals are divided on that question. The court of appeals' decision is correct and does not conflict with any decision of this Court. And no square conflict exists among the courts of appeals that would warrant this Court's review. The Court recently denied petitioner's interlocutory petition for a writ of certiorari

raising the same issue, 133 S. Ct. 1461 (2013) (No. 12-7374), and the same result is warranted here.

1. Petitioner contends (Pet. 8-14) that the courts of appeals are divided on the amount of movement necessary to constitute forced accompaniment within the meaning of 18 U.S.C. 2113(e) The asserted conflict is overstated and stale. The cases largely turn on their particular facts and, with one 40-year-old exception, they do not establish a square conflict on the substantiality of movement necessary to establish forced accompaniment under Section 2113(e)

The only court of appeals' decision petitioner cites that may conflict with the decision below is United States v. Marx, 485 F.2d 1179 (10th Cir. 1973), cert. denied, 416 U.S. 986 (1974) In that case, the president of a bank was accosted at gunpoint by the co-defendants as he returned home from a morning walk, and he was forced inside the house. Id. at 1181. Once inside, the co-defendants gathered the bank president's family into one room, gave the bank president a cashier's check, and instructed him to travel in a separate car to cash the check at the bank. Id. at 1181-1182. One defendant in Marx argued that the non-consenting victim and his family did not "accompany" him at all because the victim and his family "were never physically traveling with either" defendant. Id. at 1186. Although the Tenth Circuit did not directly resolve the degree of involuntary accompaniment necessary for a conviction

under Section 2113(e), it held that "more is required than forcing [the bank president] to enter his own house or forcing the [bank president's] family to move from the den to a bedroom." Ibid.

Whatever tension may exist with Marx, it does not warrant this Court's review. No court of appeals since Marx has held that a forced accompaniment involved a movement too insubstantial to qualify under Section 2113(e) Indeed, in the ensuing 40 years, the courts of appeals to have considered the forced-accompaniment provision of Section 2113(e) have generally adhered to the plain language of the statute and upheld convictions involving forced movements of a relatively short distance and duration. See United States v. Strobehn, 421 F.3d 1017, 1018-1020 (9th Cir. 2005) (forced bank guard to walk from parking lot to interior of bank and to lie face down inside bank), cert. denied, 547 U.S. 1005 (2006); United States v. Turner, 389 F.3d 111, 114, 119-120 (4th Cir. 2004) (forced bank manager to unlock bank vault and fill pillowcase with money; ordered tellers to get inside vault), cert. denied, 544 U.S. 935 (2005); United States v. Davis, 48 F.3d 277, 278-279 (7th Cir. 1995) (forced bank supervisor to unlock credit union and to accompany defendant inside building and vault during robbery); United States v Reed, 26 F.3d 523, 525, 526-528 (5th Cir. 1994) (forced bank employee to unlock credit union, to accompany defendant inside building during robbery, and to lie face down on floor), cert. denied, 513 U.S. 1157 (1995); United States v. Bauer,

956 F.2d 239, 241-242 (11th Cir ) (forced bank employees to walk from back of bank to front door before defendants decided not to take them as hostages), cert. denied, 506 U.S. 976 (1992)

Petitioner's contention (Pet. 10-11) that the decision below also conflicts with the Fifth Circuit's decision in Reed is incorrect. See Pet. App. 41a n.20 (noting that its "interpretation of a forced accompaniment comports with" Reed); Strobehn, 421 F.3d at 1020 (noting that Reed "rejected a 'substantiality' argument") In Reed, the Fifth Circuit held that a relatively short forced accompaniment during a bank robbery -- i.e., forcing a victim at gunpoint to unlock the door to a credit union and to accompany the defendant inside the building during the robbery -- was sufficient to uphold the defendant's conviction under Section 2113(e) 26 F.3d at 525, 528. The court determined that "moving the victim as a hostage into the bank is an accompaniment, just as moving her out of the bank as a hostage would have been an accompaniment." Id. at 528. The court also distinguished Marx on the factual ground that "the victim in this case physically accompanied the defendant" from the bank's door to the bank's vault, while in Marx "the Tenth Circuit did not address the trip to the bank" other than to note that the victims did not travel with the defendants. Id. at 526 n.3.

The Fifth Circuit also stated that "[w]ithin the context of a bank robbery, there will often be movement within the bank by a

bank employee -- movement orchestrated by the robber " Reed, 26 F.3d at 527 And the court expressed concern that if "such circumstances are an aggravating accompaniment," it "would likely convert numerous ordinary * * * bank robberies to aggravated bank robberies with only the faintest of distinctions between accompanied, i.e., aggravated, and non-accompanied, non-aggravated bank robber[ie]s." Id. at 528. Contrary to petitioner's contention, however, that dictum does not suggest that the Fifth Circuit would find that the facts here did not satisfy Section 2113(e) If anything, it suggests a distinction between movement within the bank and movement that crosses the threshold of the bank. The court in Reed suggested that such a distinction might be necessary to avoid converting "ordinary" bank robberies into aggravated bank robberies. Because this case does not involve movement within a bank, but rather movement within a woman's residence during a home invasion in an effort to avoid apprehension for an attempted bank robbery, that dictum and the concerns underlying it are not implicated here. Indeed, in a different context, the Fifth Circuit noted that Reed could be read "as authority to find abduction when the forced movement [is] from one location to another on a property owned by a single property owner." United States v. Hawkins, 87 F.3d 722, 727 (5th Cir.) (discussing abduction for purposes of Sentencing Guidelines § 2B3.1(b)(4)(A)), cert. denied, 519 U.S. 974 (1996)

Petitioner also relies (Pet. 11-13) on the Ninth Circuit's decision in Strobehn. As petitioner acknowledges, however, that court affirmed a conviction under Section 2113(e) and rejected the defendant's suggestion that the court "embrace a substantiality requirement measured by the duration and distance of the asportation." Strobehn, 421 F.3d at 1019. Petitioner is correct that the court did not "hold that [Section] 2113(e) 'plainly' applies to any forced accompaniment, no matter how slight." Id. at 1020 n.1 (citation omitted) But neither did the court below. Without attempting to define the precise degree of movement necessary for a forced accompaniment, the court of appeals held, in a single factbound paragraph, that the evidence in this case was sufficient to support the jury verdict. See Pet. App. 41a. The court broke no legal ground in reaching that conclusion; it simply applied settled circuit law that a forced accompaniment under Section 2113(e) "does not require that the victim be 'held for a particular time period.'" Id. at 32a (quoting C.A. App. 1242 and citing Turner, 389 F 3d at 119-120) That prior circuit precedent is consistent with, and is cited favorably in, Strobehn. See 421 F.3d at 1020.

2. On the merits, petitioner contends (Pet. 17-19) that some threshold amount of movement is necessary to constitute forced accompaniment within the meaning of Section 2113(e) He concedes (Pet. 17) that the statute itself does not provide any such

threshold; it requires only that the perpetrator "force[] any person to accompany him without the consent of such person." 18 U.S.C. 2113(e) Petitioner nevertheless argues that the absence of any qualifying language renders the statute ambiguous and that, viewed in context, the ambiguity should be resolved in favor of a limiting construction. That argument is without merit.

Petitioner suggests (Pet. 15-17, 18-19) that the court of appeals' "interpretation of [Section] 2113(e)" will have a "deleterious" effect on "every case prosecuted under [Section] 2113" by turning "mine-run bank robbery cases" into Section 2113(e) cases. That prediction is unfounded. Nearly every court of appeals to consider the issue has interpreted Section 2113(e) the same as the court below. And those cases have been decided over the course of the last two decades. The Fourth Circuit first considered the degree of movement necessary to establish forced accompaniment in 2004. See Turner, 389 F.3d at 119. Despite the relatively long pedigree of the interpretation adopted by the courts of appeals, petitioner fails to identify any flood of Section 2113(e) litigation arising from it. Indeed, no court of appeals has addressed the issue since this Court denied review more than a year ago.

In addition, this is not a "mine-run" bank robbery case. Unlike most of the other Section 2113(e) cases petitioner cites, the forced accompaniment did not take place inside or at the

threshold of the bank during the robbery. In an attempt to avoid apprehension for an attempted bank robbery, petitioner directed Mrs. Parnell to move into the computer room of her own home during a home invasion, where she subsequently died. Pet. App. 41a. Petitioner does not explain how the court's fact-specific holding in this case -- where petitioner attempted an armed bank robbery, fled at a high rate of speed from pursuing police, and unlawfully entered two different homes in an effort to evade capture (brandishing a knife in one and leaving a dead victim in the other) -- poses a risk of converting a "mine-run" bank robbery into an aggravated bank robbery under Section 2113(e)

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2014

# JOINT APPENDIX

RECORD AND BRIEFS

No. 13-9026

Supreme Court, U.S.
FILED
AUG 22 2014
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IN THE

# Supreme Court of the United States

LARRY WHITFIELD,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 7, 2014
CERTIORARI GRANTED JUNE 23, 2014

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# APPENDIX A — RELEVANT DOCKET ENTRIES

## RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, NO. 12-4956

* * *

| Date Filed | # | Docket Text |
|---|---|---|
| 11/29/2012 | 1 | Criminal case docketed. Originating case number: 3:09-cr-00009-RJC-DCK-1. Date notice of appeal filed: 11/26/2012. Case manager: CBennett. [12-4956] (CB) |

* * *

| | | |
|---|---|---|
| 04/30/2013 | 19 | BRIEF by Appellant Larry Whitfield in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/30/2013. [999098681] [12-4956] Joshua Carpenter |

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| | | |
|---|---|---|
| 09/06/2013 | 41 | BRIEF by Appellee US in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 09/09/2013. [999188457] [12-4956]--[Edited 09/09/2013 by CB] William Miller |
| 09/19/2013 | 43 | BRIEF by Appellant Larry Whitfield in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 09/19/2013. [999197011] [12-4956] Joshua Carpenter |
| 11/27/2013 | 45 | NOTICE ISSUED RE: Rule 34 pre-argument review. [12-4956] (TO) |
| 12/10/2013 | 46 | UNPUBLISHED PER CURIAM OPINION filed. Originating case number: 3:09-cr-00009-RJC-DCK-1. Copies to all parties and the district court/agency. Annotation added to opinion reflecting Supreme Court history. [999255851]. [12-4956]--[Edited 07/01/2014 by AW] (CB) |
| 12/10/2013 | 47 | JUDGMENT ORDER filed. Disposition method: 12-4956 opn.u.sub. Decision: |

| | | |
|---|---|---|
| | | Affirmed. Originating case number: 3:09-cr-00009-RJC-DCK-1. Entered on Docket Date: 12/10/2013. [999255855] Copies to all parties and the district court/agency. [12-4956] (CB) |
| 12/10/2013 | 48 | Copy of judgment and certiorari status form transmitted to defendant and counsel. [47] Judgment Order, [46] Unpublished per curiam Opinion. Copy mailed to defendant? Yes. Address of Defendant: FCI BENNETTSVILLE FEDERAL CORRECTIONAL INSTITUTION P.O. BOX 52020 BENNETTSVILLE, SC 29512. [12-4956] (LM) |
| 01/02/2014 | 49 | Mandate issued. Referencing: [47] Judgment Order, [46] Unpublished per curiam Opinion. Originating case number: 3:09-cr-00009-RJC-DCK-1. [12-4956] (CB) |
| 01/06/2014 | 50 | CERTIORARI STATUS FORM by Appellant Larry Whitfield. [12-4956] Joshua Carpenter |
| 03/11/2014 | 51 | SUPREME COURT REMARK--petition for writ of certiorari filed. 03/07/2014. 13-9026. [12-4956] (AW) |

*Appendix A*

| | | |
|---|---|---|
| 06/23/2014 | 52 | SUPREME COURT REMARK-- petition for writ of certiorari granted. 06/23/2014 [12-4956] (AW) |

* * * *

*Appendix A*

**RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, NO. 10-5217**

* * *

| Date Filed | # | Docket Text |
|---|---|---|
| 12/01/2010 | 1 | Criminal case docketed. Originating case number: 3:09-cr-00009-RJC-1. Date notice of appeal filed: 11/30/2010. Case manager: ADohnal. [10-5217] (AFD) |

* * *

| | | |
|---|---|---|
| 07/27/2011 | 35 | Corrected BRIEF by Appellant Larry Whitfield in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/27/2011. Is this a redacted brief? No. If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998641596] [10-5217] Matthew Segal |

* * *

| | | |
|---|---|---|
| 11/09/2011 | 45 | BRIEF by Appellee US in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 11/10/2011. [998720215] [10-5217] Amy Ray |

* * *

| | | |
|---|---|---|
| 12/19/2011 | 49 | BRIEF by Appellant Larry Whitfield in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 12/19/2011. [998747339] [10-5217] Matthew Segal |

* * *

| | | |
|---|---|---|
| 05/18/2012 | 63 | ORAL ARGUMENT heard before the Honorable J. Harvie Wilkinson, III, Paul V. Niemeyer and Robert B. King. Attorneys arguing case: Mr. Thomas Norman Cochran, Esq. for Appellant Larry Whitfield and Ms. Amy Elizabeth Ray for Appellee US. Courtroom Deputy: Joseph Coleman. [998857426] [10-5217] (JLC) |
| 08/22/2012 | 64 | PUBLISHED AUTHORED OPINION filed. Originating case number: 3:09-cr- |

00009-RJC-1. Paper copies to all parties and the district court/agency. [998922099]. [10-5217] (DSD)

08/22/2012 65 JUDGMENT ORDER filed. Disposition method: 10-5217 opn.p.arg. Decision: Affirmed in part, vacated in part, and remanded. Originating case number: 3:09-cr-00009-RJC-1. Entered on Docket Date: 08/22/2012. [998922109] Copies to all parties and the district court/agency. [10-5217] (DSD)

* * *

09/13/2012 68 Mandate issued. Referencing: [65] Judgment order, [64] Published Authored Opinion. Originating case number: 3:09-cr-00009-RJC-1. [10-5217] (AFD)

* * * *

*Appendix A*

**RELEVANT DOCKET ENTRIES FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NORTH CAROLINA (CHARLOTTE), CRIMINAL DOCKET FOR CASE #: 3:09-CR-00009-RJC-DCK-1**

* * *

| Date Filed | # | Docket Text |
|---|---|---|
| 01/23/2009 | 1 | BILL OF INDICTMENT as to Larry Whitfield (1) count(s) 1, 2, 3, 4, Quanterrious McCoy (2) count(s) 1, 2, 3. (Attachments: # 1 Cover Sheet) (mga) (Entered: 01/26/2009) |
| | | * * * |
| 02/24/2009 | 13 | ORDER OF DETENTION as to Larry Whitfield. Signed by Magistrate Judge Carl Horn, III on 2/24/09. (tob) (Entered: 02/24/2009) |
| | | * * * |
| 11/16/2009 | | Minute Entry: JURY TRIAL as to Larry Whitfield held before Chief Judge Robert J. Conrad, Jr. Jury selected and sworn. Opening Statements. Evidence Introduced. Government attorney: Adam Morris. |

Defendant attorney: Kevin Tate and Erin Taylor. Court Reporter Laura Andersen. (chh) (Entered: 11/17/2009)

* * *

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|---|---|
| 11/17/2009 | Minute Entry: JURY TRIAL as to Larry Whitfield held before Chief Judge Robert J. Conrad, Jr. Evidence continued. Government attorney: Adam Morris and Thomas O'Malley. Defendant attorney: Kevin Tate and Erin Taylor. Court Reporter Laura Andersen. (chh) (Entered: 11/18/2009) |

* * *

| | |
|---|---|
| 11/18/2009 | Minute Entry: EVIDENTIARY HEARING re: suppression of statement given by the defendant as to Larry Whitfield held before Chief Judge Robert J. Conrad, Jr. Government attorney: Adam Morris and Thomas O'Malley. Defendant attorney: Kevin Tate and Erin Taylor. Court Reporter Laura Andersen. (chh) (Entered: 11/18/2009) |
| 11/18/2009 | Minute Entry: JURY TRIAL as to Larry Whitfield held before Chief Judge Robert J. Conrad, Jr. Evidence continued. Charge Conference. |

| | | |
|---|---|---|
| | | Government attorney: Adam Morris and Thomas O'Malley. Defendant attorney: Kevin Tate and Erin Taylor. Court Reporter Laura Andersen. (chh) (Entered: 11/18/2009) |
| 11/19/2009 | | Minute Entry: JURY TRIAL as to Larry Whitfield held before Chief Judge Robert J. Conrad, Jr. Government rested. Defendant rested. Closing arguments. Oral Rule 29 Motion by defendant is denied by court. Oral Renewed Rule 29 Motion is Denied by Court. Government attorney: Morris, O'Malley. Defendant attorney: Tate, Taylor. Court Reporter Andersen. (ssh) (Entered: 11/23/2009) |
| 11/20/2009 | | Minute Entry: JURY TRIAL as to Larry Whitfield held before Chief Judge Robert J. Conrad, Jr. Courts charge. Jury retired to deliberate. Jury returns verdict. Government attorney: Morris, O'Malley. Defendant attorney: Tate, Taylor. Court Reporter Andersen. (ssh) Modified on 11/23/2009 to correct docket entry date (ssh). (Entered: 11/23/2009) |
| 11/23/2009 | 52 | JURY VERDICT as to Larry Whitfield (1) Guilty on Count 1, 2, 3, 4. (ssh) (Entered: 11/23/2009) |

*Appendix A*

* * *

| | | |
|---|---|---|
| 12/04/2009 | 55 | **ORDER as to Larry Whitfield re: admissibility of "jailhouse" confession. Signed by Chief Judge Robert J. Conrad, Jr. on 12/4/09. (gpb)** (Entered: 12/04/2009) |
| 12/07/2009 | 56 | MOTION to Set Aside Judgment *As to Count Four and Enlarge Time for Filing Rule 29 Memorandum* by Larry Whitfield. Responses due by 12/17/2009. (Tate, Kevin) (Entered: 12/07/2009) |
| 12/07/2009 | 57 | RESPONSE to Motion by USA as to Larry Whitfield re 56 MOTION to Set Aside Judgment *As to Count Four and Enlarge Time for Filing Rule 29 Memorandum* (Morris, Adam) (Entered: 12/07/2009) |

* * *

| | | |
|---|---|---|
| 01/06/2010 | 61 | **ORDER denying 56 Motion to Set Aside Judgment as to Larry Whitfield (1). Signed by Chief Judge Robert J. Conrad, Jr. on 1/6/10.** (gpb) (Entered: 01/06/2010) |
| 01/07/2010 | 62 | **AMENDED ORDER as to Larry Whitfield re 61 Order on Motion to** |

**Set Aside Judgment. Signed by Chief Judge Robert J. Conrad, Jr. on 1/7/10. (gpb)** (Entered: 01/07/2010)

02/22/2010 67 PRESENTENCE INVESTIGATION REPORT (Draft Report) *(SEALED - government and defense counsel)* as to Larry Whitfield. Objections to PSI due 3/11/2010. (available to USA, Larry Whitfield) (Easley, Cynthia) (Entered: 02/22/2010)

03/18/2010 68 OBJECTION TO PRESENTENCE INVESTIGATION REPORT *(Sealed - Attorney)* by Larry Whitfield; (available to: USA, Larry Whitfield) (Taylor, Erin) (Entered: 03/18/2010)

06/29/2010 74 PRESENTENCE INVESTIGATION REPORT (Final Report) *(SEALED - government and defense counsel)* as to Larry Whitfield. (available to USA, Larry Whitfield) Schedule for Sentence on or after 7/9/2010 (Easley, Cynthia) (Entered: 06/29/2010)

* * *

10/27/2010 80 **AMENDED ORDER as to Larry Whitfield re 55 Order. Evidence of Defendant's "jail house" confession to bank robbery on 9/27/2008 at the**

**Gaston County Jail is inadmissable. Signed by Chief Judge Robert J. Conrad, Jr. on 10/27/10.** (gpb) (Entered: 10/27/2010)

* * *

| | | |
|---|---|---|
| 11/08/2010 | 82 | MEMORANDUM *Sentencing Memorandum* by Larry Whitfield (Tate, Kevin) (Entered: 11/08/2010) |
| 11/10/2010 | | Minute Entry: SENTENCING as to Larry Whitfield held before Chief Judge Robert J. Conrad, Jr. Factual Basis Found. Government attorney: O'Malley. Defendant attorney: Taylor, Tate. Court Reporter Andersen. (ssh) (Entered: 11/17/2010) |
| 11/29/2010 | 83 | **JUDGMENT as to Larry Whitfield (1), Count(s) 1, 240 mos. imp conc w/ cnt. 4 + 3 yr SRT conc. + $100 assess + $1,495.78 rest + $1,000 CAC costs; Count(s) 2, 240 mos. imp. conc w/ cnts 1 & 4 + 3 yr SRT conc. + $100 assess; Count(s) 3, 60 mos. imp consec w/ cnts 1, 2 & 4 + 5 yr SRT conc. + $100 assess; Count(s) 4, Life Imp. + 5 yr SRT conc. + $100 assess. *Restitution ordered to be paid jointly and severally.* Signed by Chief Judge Robert J. Conrad, Jr. on 11/29/10. (ssh)** (Main Document |

| | | |
|---|---|---|
| | | 83 replaced on 11/30/2010) (ssh). Regenerated NEF (ssh). (Entered: 11/30/2010) |
| 11/29/2010 | 84 | **STATEMENT OF REASONS *(Sealed - Attorney)* re: 83 Judgment, (available to: USA, Larry Whitfield). Signed by Chief Judge Robert J. Conrad, Jr. on 11/29/10. (ssh)** (Entered: 11/30/2010) |
| 11/30/2010 | 85 | NOTICE OF APPEAL by Larry Whitfield. (Tate, Kevin) (Entered: 11/30/2010) |

* * *

| | | |
|---|---|---|
| 08/22/2012 | 100 | Published Opinion from Fourth Circuit Court of Appeals as to Larry Whitfield re: 85 Notice of Appeal. 4th Circuit decision: Affirmed in part, vacated in part and Remanded. (Attachments: # 1 USCA Jgm)(bsw) (Entered: 08/22/2012) |
| 09/13/2012 | 101 | MANDATE of USCA as to Larry Whitfield re 100 Opinion - USCA, 85 Notice of Appeal (bsw) (Entered: 09/13/2012) |

* * *

| | | |
|---|---|---|
| 10/29/2012 | 104 | PRESENTENCE INVESTIGATION REPORT (Supplement) *(SEALED - Attorney)* as to Larry Whitfield. (available to USA, Larry Whitfield) (Cindy Easley - smr) (Entered: 10/29/2012) |

* * *

| | | |
|---|---|---|
| 10/30/2012 | 108 | OBJECTION TO PRESENTENCE INVESTIGATION REPORT *(Sealed - Attorney)* by Kevin A. Tate; (available to: USA, Larry Whitfield) (Tate, Kevin) (Entered: 10/30/2012) |
| 10/31/2012 | 109 | RESPONSE in Opposition by USA as to Larry Whitfield re 108 Objection to Presentence Investigation Report (O'Malley, Thomas) (Entered: 10/31/2012) |
| 10/31/2012 | | Minute Entry: RESENTENCING upon remand from FCCA (count 4) as to Larry Whitfield held before Chief Judge Robert J. Conrad, Jr. Government attorney: O'Malley. Defendant attorney: Tate, Taylor. Court Reporter: Andersen. (ssh) Modified on 1/15/2013 to correct hearing date (ssh). (Entered: 11/01/2012) |

| | | |
|---|---|---|
| 11/20/2012 | 110 | **AMENDED JUDGMENT as to Larry Whitfield (1), Count(s) 1, 240 mos. imp conc w/ cnt. 4 + 3 yr SRT conc. + $100 assess + $1,495.78 rest + $1,000 CAC costs; Count(s) 2, 240 mos. imp. conc w/ cnts 1 & 4 + 3 yr SRT conc. + $100 assess; Count(s) 3, 60 mos. imp consec w/ cnts 1, 2 & 4 + 5 yr SRT conc. + $100 assess; Count(s) 4, 264 mos. (upon remand from FCCA). Signed by Chief Judge Robert J. Conrad, Jr. on 11/20/12. (ssh)** (Entered: 11/20/2012) |
| 11/20/2012 | 111 | **STATEMENT OF REASONS *(Sealed - Attorney)* re: 110 Amended Judgment, (available to: USA, Larry Whitfield). Signed by Chief Judge Robert J. Conrad, Jr. on 11/20/12. (ssh)** (Entered: 11/20/2012) |
| 11/26/2012 | 112 | NOTICE OF APPEAL by Larry Whitfield. *Use this link www.ca4.uscourts.gov to retrieve 4th Circuit case opening documents, i.e. Appearance of Counsel, Docketing Statement, Disclosure Statement, Transcript Order Form, and CJA 24 Vouchers.* Note: Your Transcript Order Form (and CJA 24 if applicable) must be served on the District Court as well as the Circuit Court. (IFP/CJA) (Tate, Kevin) (Entered: 11/26/2012) |

*Appendix A*

* * *

| | | |
|---|---|---|
| 12/10/2013 | 120 | Unpublished Opinion from Fourth Circuit Court of Appeals as to Larry Whitfield re: 112 Notice of Appeal. 4th Circuit decision: Affirmed. (Attachments: # 1 USCA Judgment) (tmg) (Entered: 12/10/2013) |
| 01/02/2014 | 121 | MANDATE of USCA as to Larry Whitfield re 112 Notice of Appeal, 120 Opinion - USCA (ssh) (Entered: 01/02/2014) |

* * * *

## APPENDIX B — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED DECEMBER 10, 2013

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-4956

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

LARRY WHITFIELD,

*Defendant-Appellant.*

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:09-cr-00009-RJC-DCK-1).

Submitted November 27, 2013

Decided December 10, 2013

Before WILKINSON, NIEMEYER, and KING, Circuit Judges.

*Appendix B*

PER CURIAM:

Larry Whitfield appeals from the amended criminal judgment imposed following our remand of his case to the district court for resentencing for his forced accompaniment conviction under 18 U.S.C. § 2113(e) (2012). *See United States v. Whitfield*, 695 F.3d 288, 311 (4th Cir. 2012). At the resentencing hearing, Whitfield challenged the district court's application of U.S. Sentencing Guidelines Manual ("USSG") § 2A1.1 (2009). The district court rejected Whitfield's argument, concluding that his conduct caused the death of the victim, Mary Parnell. The court imposed a 264-month sentence for Whitfield's § 2113(e) conviction.

On appeal, Whitfield first contends that the district court erred by miscalculating his Guidelines range. We review Whitfield's sentence under a deferential abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 41 (2007). This review requires consideration of both the procedural and substantive reasonableness of the sentence. *Id.* at 51; *United States v. Lynn*, 592 F.3d 572, 575 (4th Cir. 2010). In determining procedural reasonableness, we consider whether the district court properly calculated the defendant's advisory Guidelines range, considered the 18 U.S.C. § 3553(a) (2012) factors, and sufficiently explained the selected sentence. *Gall*, 552 U.S. at 51.

In assessing whether a district court properly calculated the Guidelines range, "including application of any sentencing enhancements, we review the district court's legal conclusions de novo and its factual findings

for clear error." *United States v. Layton*, 564 F.3d 330, 334 (4th Cir. 2009). "[S]entencing judges may find facts relevant to determining a Guidelines range by a preponderance of the evidence, so long as that Guidelines sentence is treated as advisory and falls within the statutory maximum authorized [by the jury's verdict]." *United States v. Alvarado Perez*, 609 F.3d 609, 614 (4th Cir. 2010) (internal quotation marks omitted).

The district court in this case determined Whitfield's Guidelines range by first applying USSG § 2B3.1, which provides the offense level for robbery. Section 2B3.1(c) directs a court to apply a cross-reference to USSG § 2A1.1 "[i]f a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111." The definition of first-degree murder includes killings "committed in the perpetration of, or attempt to perpetrate, any . . . burglary, or robbery." 18 U.S.C. § 1111 (2012); *see also United States v. Williams*, 342 F.3d 350, 356 (4th Cir. 2003).

In support of his contention that the district court miscalculated the applicable Guidelines range, Whitfield argues that the court should not have applied USSG § 2B3.1's cross-reference to the felony murder provision in USSG § 2A1.1. He asserts that the district court applied an improper causation standard in determining that he caused Parnell's death.

At resentencing, the district court found by a preponderance of the evidence presented at trial, including the testimony of the Government's expert witnesses, that Parnell's death was caused by Whitfield's conduct.

We cannot say, after careful review of the record, that this finding is clearly erroneous or that the district court committed legal error in assessing the evidence. Therefore, Whitfield's causation argument entitles him to no relief.

Whitfield alternatively asserts that the district court erred in concluding that the forced accompaniment, as opposed to his mere presence, caused Parnell's death. The Guidelines, however, do not require that the forced accompaniment directly cause the death; instead, USSG § 2A1.1 is applicable because Parnell's death occurred during the course of Whitfield's attempted robbery. *See* USSG § 2A1.1 cmt. n.1 (noting provision's applicability "when death results from the commission of certain felonies"). We therefore conclude that the district court did not err in applying the cross-reference to USSG § 2A1.1 for Whitfield's forced accompaniment conviction.*

Whitfield next contends that the district court violated his Fifth and Sixth Amendment rights by resentencing him on acquitted conduct. As Whitfield acknowledges, however, this argument is foreclosed by our decision in *United States v. Young*, 609 F.3d 348, 356 (4th Cir. 2010).

Finally, Whitfield argues that his 264-month sentence exceeds the statutory maximum. In *United States v. Turner*, 389 F.3d 111, 121 (4th Cir. 2004), we

---

* Because we conclude that the district court did not err in resentencing Whitfield, we reject his arguments that he should be resentenced on his other convictions and that he should be resentenced by a different district court judge.

interpreted § 2113(e) "to permit a maximum sentence of life imprisonment" for forced accompaniment convictions. We therefore conclude that this argument lacks merit.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

*Appendix B*

FILED: December 10, 2013

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-4956
(3:09-cr-00009-RJC-DCK-1)

UNITED STATES OF AMERICA

*Plaintiff-Appellee*

v.

LARRY WHITFIELD

*Defendant-Appellant*

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

## APPENDIX C — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DATED AUGUST 22, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-5217

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

LARRY WHITFIELD,

*Defendant-Appellant.*

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., Chief District Judge. (3:09-cr-00009-RJC-1)

Argued: May 18, 2012
Decided: August 22, 2012

Affirmed in part, vacated in part, and remanded by published opinion. Judge King wrote the opinion, in which Judge Wilkinson and Judge Niemeyer joined.

Before WILKINSON, NIEMEYER, and KING, Circuit Judges.

*Appendix C*

KING, Circuit Judge:

Larry Whitfield appeals his convictions and aggregate life-plus-sixty-month sentence in the Western District of North Carolina for his role in a botched bank robbery and a mid-escape home intrusion, which ended tragically in the death of an innocent elderly woman. Whitfield asserts four appellate contentions, only one of which has merit—that the district court erred in instructing the jury on an offense not charged in the indictment. As explained below, we are constrained to vacate Whitfield's conviction and mandatory life sentence on the uncharged offense and remand for an amendment of the judgment and resentencing, while affirming the balance of his convictions.

I.

A.

On the morning of September 26, 2008, Whitfield and his partner-in-crime Quanterrious McCoy—armed with a .357 handgun and an AK-47 assault rifle—entered the front door of the Fort Financial Credit Union in Gastonia, North Carolina.[1] As they crossed the threshold into the credit union's small vestibule, a metal detector triggered an automatic locking mechanism on the inside lobby doors. Whitfield shook the bulletproof doors, but the lock held fast, preventing entry into the lobby of the credit union.

1. We recite the relevant facts in the light most favorable to the government, as the prevailing party at trial. *See United States v. Jefferson*, 674 F.3d 332, 341 n.14 (4th Cir. 2012).

As a result, Whitfield and McCoy fled in their car in an eastwardly direction towards Charlotte on Interstate 85. Alerted to the attempted bank robbery, a Gastonia police officer began pursuing a white Ford Crown Victoria with two occupants matching the culprits' descriptions. Because it was raining and the Gastonia officer was fearful of an accident, he withdrew from the high-speed pursuit. The officer was about to exit the interstate when he noticed that the Crown Victoria had left the highway and was stuck in the median. Whitfield and McCoy had fled the vehicle on foot into the woods, ditched their firearms, made their way to nearby Belmont, North Carolina, and separated from one another.

McCoy was apprehended after being found hiding under a van. Whitfield opted to forcibly enter the residence of a woman named Tina Walden, who soon thereafter returned from work. When Walden sought to unlock her door and enter her home, she realized the lock was jammed and noticed a footprint on the door. While Walden was attempting to call her husband by cell phone, Whitfield opened the door from inside the residence, brandished a kitchen knife, and instructed Walden to "shut up and come in." J.A. 532.[2] Instead, Walden turned and ran. Whitfield then fled from Walden's home, discarding the knife along his escape route to the nearby home of Herman and Mary Parnell. He entered the Parnell residence through the unlocked front door and encountered Mrs. Parnell, who was home alone. Mrs. Parnell immediately became very

2. Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties in this appeal.

upset and began to cry. Meanwhile, Whitfield used his cell phone to text message a friend, Tamecia Sanders, notifying her that he was in trouble and asking for a ride. Sanders spoke on the phone with Whitfield several times during the approximate twenty-mile drive from her location on the east side of Charlotte to the Parnell residence. During their final conversation, Sanders informed Whitfield that she needed directions in order to find him. At that time, Sanders overheard Whitfield tell Mrs. Parnell, "[M]a'am, just calm down. I'm probably more scared than you are, and I'm actually just trying to leave." *See id.* at 673. Sanders also spoke on the phone directly with Mrs. Parnell. According to Sanders, Mrs. Parnell sounded afraid, though she calmed herself enough to give Sanders directions.

When Whitfield got back on the phone with Sanders, he said that "it looked like [Mrs. Parnell] wasn't breathing." J.A. 680. Sanders also overheard Mrs. Parnell say that she was short of breath, to which Whitfield inquired whether she had "any aspirin or anything that she usually takes [and] if he could get her a glass of water." *Id.* at 753. Sanders suggested that Whitfield "step outside in the hallway," "give [Mrs. Parnell] a minute," and call an ambulance. *Id.* at 680. Whitfield did not call the ambulance, but remained on the phone with Sanders, remarking to her sporadically that Mrs. Parnell appeared to be unconscious and may have died. Between 3:30 and 4:00 p.m., a neighbor of the Parnells, Joshua Smith, an off-duty police officer with the nearby Town of Cramerton, called the Parnells to warn that one of the bank robbers had been seen in the area. After repeatedly receiving a busy signal or no

answer, Smith walked to the Parnell house, knocked, and rang the doorbell. When no one answered, he returned home. Smith's efforts nonetheless prompted Whitfield to end his phone call with Sanders and flee the Parnell home through its back door. Whitfield was soon discovered hiding nearby, and he was arrested.

When Herman Parnell returned home through the back door that Whitfield had left ajar, he found his wife motionless, sitting in a chair at his desk in the computer room. Although Mr. Parnell sought to resuscitate Mrs. Parnell and called 911 for assistance, she was never revived and was pronounced dead, having suffered a heart attack. During Whitfield's questioning by the police on the evening of September 26 and the early morning of September 27, he signed two statements confessing to the Belmont home break-ins and another statement confessing to the attempted robbery of the credit union.

B.

1.

On January 23, 2009, the grand jury in Charlotte returned a four-count indictment against Whitfield and McCoy, charging them with attempted bank robbery, in contravention of 18 U.S.C. §§ 2113(a) and 2 (Count One); conspiracy to carry a firearm during an attempted bank robbery, in violation of 18 U.S.C. § 924(o) (Count Two); and carrying a firearm during an attempted bank robbery, in contravention of 18 U.S.C. §§ 924(c) and 2 (Count Three). Count Four, naming Whitfield only, charged him with

violating 18 U.S.C. § 2113(e), which provides, in relevant part, that

> [w]hoever, . . . in avoiding or attempting to avoid apprehension for the commission of [any] offense [defined in this section], . . . kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

18 U.S.C. § 2113(e).

As discussed further *infra*, § 2113(e) encompasses three alternative offenses pertinent to this case—penalizing a defendant who, in evading apprehension for an attempted bank robbery: (1) "kills any person" (the "killing offense"); or (2) "forces any person to accompany him without the consent of such person" (the "forced accompaniment offense"); or (3) "forces any person to accompany him without the consent of such person" and "death results" (the "death results offense").[3] Count Four of the indictment, however, alleged only two of the three alternative offenses, charging:

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3. In these circumstances, the forced accompaniment offense is a lesser included offense of the death results offense, in that the elements of the former "must be included within but not, on the facts of the case, be completely encompassed by the greater" death results offense. *See Sansone v. United States*, 380 U.S. 343, 350 (1965).

*Appendix C*

> LARRY WHITFIELD did knowingly enter and attempt to enter Fort Financial Credit Union . . . with intent to commit therein a felony affecting that credit union, in violation of 18 U.S.C. § 2113(a), . . . as set forth in COUNT ONE of this Indictment; and in avoiding or attempting to avoid apprehension for said offense, forced M.P. to accompany him without her consent, and killed M.P.

J.A. 14. Thus, the allegations of Count Four were limited to the first and second alternative § 2113(e) offenses—the killing offense and the forced accompaniment offense—and failed to include the third, the death results offense.

On September 16, 2009, Whitfield moved to dismiss Count Four of the indictment, asserting that § 2113(e) was unconstitutionally vague and that the killing offense could only be properly charged if the prosecution were required to prove that Whitfield intentionally caused the death of Mrs. Parnell. The government opposed the dismissal motion and argued the elementary principle that it had "charged 'killing' and 'forced accompaniment' in the conjunctive, but [was entitled to] prove them in the disjunctive." *See* J.A. 23. The government also proposed that the word "kills" in § 2113(e) be understood from its basic dictionary definition, which does not require specific intent, and invoked the statute's (unindicted) "if death results" provision as reinforcement of such a meaning. *See id.* at 30-31. On October 21, 2009, the district court validated the constitutionality of § 2113(e) and denied Whitfield's motion to dismiss Count Four.

*Appendix C*

2.

On October 9, 2009, about five weeks before trial, Whitfield moved to suppress his post-arrest confessions to the two Belmont home break-ins and the attempted bank robbery. Whitfield's confessions to the Belmont home break-ins had been elicited during what the district court would designate as the "first part" of the police interview, while the attempted bank robbery confession had been obtained at the conclusion of the "second part" of the interview.

On November 9, 2009, the court conducted an evidentiary hearing on the suppression motion, receiving evidence from Gastonia Police Detective Tony Wilson and Gaston County Police Detective Michael Sumner. Following argument from counsel, the court orally denied Whitfield's motion. In so ruling, the court observed that it had reviewed the video recording of the two-part interview and listened carefully to the evidence of the detectives, which it found "credible." *See* J.A. 172. From the evidence, the court perceived that Whitfield, though "very young, and less experienced," was "conversational," "comfortable," and "intelligent" enough to be "capable of deciding when to provide information and when not to." *Id.* at 173. Accordingly, the court concluded that, based on "the totality of circumstances," Whitfield's "will was not overborne," and "[t]hat the statements he made were not in violation of the Constitution." *Id.* at 173-74. An order denying Whitfield's motion to suppress was entered the day of the hearing.

*Appendix C*

Whitfield's jury trial began a week later, on November 16, 2009, in Charlotte. The prosecution presented several witnesses on the first day thereof, including credit union tellers and codefendant McCoy, who testified to his and Whitfield's involvement in the attempted bank robbery and getaway.[4] The second-day witnesses included Gaston County Police Detective William Sampson and other investigating officers. During its examination of Sampson regarding the first part of Whitfield's post-arrest interview, the prosecution introduced Whitfield's confessions to the two Belmont home break-ins, as well as a transcript primarily consisting of the first part of the interview. Before Sampson could testify concerning the second part of the interview, however, the trial court elected to begin the defense's cross-examination of Sampson—deferring Sampson's direct testimony about Whitfield's confession to the attempted bank robbery. The second day of trial concluded after the prosecution's examination of Tamecia Sanders.

When the trial commenced the next morning, the district court explained that Sampson's trial testimony warranted further analysis of whether Whitfield had voluntarily confessed to the attempted bank robbery. The court then delayed the trial proceedings to conduct another suppression hearing—outside the presence of the jury—regarding the second part of Whitfield's post-arrest interview. After hearing further evidence and argument, the court suppressed Whitfield's confession to the

4. Pursuant to a plea agreement, McCoy had pleaded guilty to Counts One and Three on May 26, 2009. He was sentenced on February 19, 2010, to eighty-four months in prison.

attempted bank robbery because it had been "coerced," such that his "will was overborne, and his capacity for self-determination [was] critically impaired." J.A. 738.

Memorializing the ruling made at the second suppression hearing, the district court, nearly a year thereafter, entered an order confirming that the attempted bank robbery confession was inadmissible and so amending its contrary November 9, 2009 order. *See United States v. Whitfield*, No. 3:09-cr-00009, 2009 U.S. Dist. LEXIS 120487 (W.D.N.C. Oct. 27, 2010) (the "Suppression Order").[5] The court's findings of fact relating to Whitfield's confessions to the home break-ins and the attempted bank robbery are summarized below—supplemented to a limited extent by the interview transcript.

a.

After Whitfield's arrest on September 26, 2008, which occurred at approximately 6:00 p.m., he was detained at the Gastonia Police Department. Gaston County Detectives Sumner and Sampson questioned Whitfield initially, beginning at approximately 7:30 p.m. As Whitfield had been outside in the rain, he "was cold, wet, and visibly shaking for some of the interview." Suppression Order 2. Before questioning Whitfield, Sampson gave *Miranda* warnings, explaining "that it was 'no big deal'" and would be "just like [Whitfield] had 'seen on T.V.'" *Id.* Consistent with established procedure, Sampson provided Whitfield a copy of the *Miranda* warnings and requested that he

5. The Suppression Order is found at J.A. 1370-82.

initial each of them. Sampson directed Whitfield to initial the sheet without inquiring whether he understood his rights, except for the right to remain silent. Sampson read Whitfield a concluding summary of his *Miranda* rights and, instructing Whitfield to sign, asked, "'Is that cool, Larry?'" *See id.* at 3.

At the outset, "Detectives Sampson and Sumner led [Whitfield] to believe that their interest in questioning him was limited to [the two Belmont home break-ins]." Suppression Order 2. The detectives explained that, as members of the Gaston County Police, "their jurisdiction only covered the break-ins," and they were not concerned with what happened in another jurisdiction, i.e., the attempted bank robbery in Gastonia. *Id.* at 3. Or, as one of the detectives put it, they were interested in the "'lesser of the evils.'" *Id.* "In reality," however, the detectives aimed to acquire enough information "to charge [Whitfield] with attempted bank robbery, kidnapping of [Mrs. Parnell], and, because she had subsequently died of a heart attack, first degree felony-murder." *Id.* at 2. After the detectives questioned Whitfield "aggressively," he confessed to the two break-ins, explaining that he had entered the Parnell home from its back door, but had not interacted with Mrs. Parnell because she was asleep in the computer room. *See id.* at 3. At approximately 8:35 p.m., Whitfield signed a written statement to that effect. Both detectives expressed their appreciation for Whitfield's "forthrightness," and they took a brief break. *See id.*

When Detectives Sampson and Sumner returned, they continued questioning Whitfield about the break-in at the Parnell home. The detectives were at times joined

by Gaston County Police Sergeant Chris Reynolds. At one point, Sergeant Reynolds encouraged Whitfield, advising him that "you're doing nothing but helping yourself" by volunteering information, and falsely stating that Mrs. Parnell had "ID'd" Whitfield. *See* J.A. 1296. Eventually, Whitfield admitted that he had entered the Parnell home through its front door—rather than the back door—and that Mrs. Parnell was awake when he encountered her inside the home. Whitfield emphasized that he told Mrs. Parnell that he had "no weapons and [was] not [t]here to hurt [her]," but "just need[ed] somewhere to stay." *Id.* at 1312.

With respect to why Mrs. Parnell was later found in the computer room, Whitfield initially admitted that he had "guide[d] her to the . . . office" but then appeared to retract that statement, explaining:

> [L]ike I didn't, no. I didn't . . . . I just know, she, she was in front of me and she went into the computer room. I don't remember to—, I really don't remember touching her. Like come on ma'am . . . . I was cooperative with her and she was cooperative with me. I didn't put my hands on her.

J.A. 1312-13. Whitfield stated that he "asked her . . . where [they] could go where [the police] wouldn't . . . see," and that he and Mrs. Parnell "just took . . . the first room [i.e., the computer room]. . . . I was like right here." *Id.* at 1315. When Mrs. Parnell later emerged from the computer room insisting that Whitfield leave, he "asked her to go into the

computer room," and also asked "where could [they] go in the house where the police couldn't see," at which point "[Mrs. Parnell] sat down in the chair [in the computer room]." *Id.* at 1317.

At 9:07 p.m., Whitfield signed a second written statement, correcting his first statement by admitting that he had entered the Parnell home through the front door and had interacted with Mrs. Parnell. In its Suppression Order, the district court confirmed its previous ruling of November 9, 2009, that the "inculpatory statements made by [Whitfield regarding the two Belmont home break-ins were] knowingly and voluntarily made." Suppression Order 1 n.2.

b.

After Whitfield signed his statements confessing to the Belmont home break-ins, "the tone of the interrogation suddenly changed." Suppression Order 3. During the first part of their interview of Whitfield, neither Detective Sumner nor Detective Sampson asked Whitfield about his reasons for fleeing from the police. Following "[Whitfield's] initial cooperation, however, Sampson and Sumner began to focus on the bank robbery, telling [him] they wanted to '[g]et everything together, stack it up . . . [and] get it all over with.'" *Id.* As the district court found, "Sumner and Sampson's questioning became leading, mounting an assault on [Whitfield's] repeated denials of his involvement in the attempted bank robbery with an arsenal of both real and fabricated evidence." *Id.* Despite the detectives' warnings to Whitfield that his case would be "hopeless if

it were ever brought before a jury" and that "his charges could be mitigated if he would only cooperate instead of holding out and acting like a 'thug,'" Whitfield continued to deny any involvement in the attempted bank robbery. *Id.* at 4.

At approximately 9:55 p.m., Detectives Sumner and Sampson notified Whitfield that he would be transported to a Gaston County detention facility and then formally charged. Gastonia Detectives Wilson and McSwain, however, then questioned Whitfield for another hour or so. According to the court, Wilson and McSwain followed Sumner and Sampson's tack, "intend[ing] to convince [Whitfield] that his only chance to salvage his otherwise 'bright future' was to confess to the attempted bank robbery." Suppression Order 4. Whitfield, however, refused to admit he had been involved in that offense, finally prompting Wilson to urge Whitfield to "'be righteous. . . . Tell me what happened today and we both walk out of here.'" *Id.* at 5. Whitfield "attempted to end the interrogation by saying 'I can't say no more. But I'm gonna plead, just plead my case that I got against me.'" *Id.* Detective Wilson persisted, however, until he realized that Whitfield was unlikely to confess. Whitfield was then transported to the Gaston County jail.

After arriving at the jail at approximately 12:15 a.m. on September 27, 2008, Detective Sampson read Whitfield the arrest warrant that had been issued against him, which charged kidnapping, breaking and entering, and first degree murder. Realizing he was being charged with murder, Whitfield "looked at [Sampson and Sumner]

and asked, 'What can I do to help myself?'" Suppression Order 6. At that point, Sampson believes that "he clarified [Whitfield's] intent to reinitiate the interrogation by asking if [Whitfield] was sure that he wanted to talk." *Id.* Sampson and Sumner again "Mirandized" Whitfield, who wrote "yes" beside each statement of his rights. Thereafter, Whitfield signed his confession to the attempted bank robbery.

In its Suppression Order, the district court explained that "the coercive nature of the preceding interrogation, Sampson's mediocre reading of [Whitfield's] *Miranda* rights, and the fact that the presentation of [Whitfield's] charges was an attempt to elicit his confession rather than a standard booking procedure," inevitably led to the conclusion that Whitfield did not "re-initiate[ ] questioning at the presentment of his charge by asking "'What can I do to help myself?'" Suppression Order 11-12. Nor did the "break in time and location resulting from [Whitfield's] transport to the Gaston County Jail" dissipate the coercion. *Id.* at 12. "Based upon the totality of circumstances," therefore, the court suppressed Whitfield's attempted bank robbery confession, finding that it was "involuntary" and "inadmissible under 18 U.S.C. § 3501." *Id.*

3.

After the district court's mid-trial evidentiary hearing and suppression of Whitfield's confession to the attempted bank robbery, the proceedings resumed. Although the prosecution had not completed its case by the end of the

third day of trial, the court conducted a charge conference. Much of that conference dealt with the issues relating to 18 U.S.C. § 2113(e) and Count Four's allegations. Notably, the government's proposed instruction on Count Four tracked the language of the indictment, referencing only the killing offense and the forced accompaniment offense, as follows:

> COUNT FOUR requires you to determine whether the defendant killed the victim, M.P., or whether the defendant forced the victim, M.P., to accompany him, while the defendant was attempting to avoid apprehension for the bank robbery charged in COUNT ONE.

J.A. 207. Acting sua sponte, the court presented an instruction directing the jury to consider the unalleged third alternative offense, i.e., the death results offense. In objecting to the court's instruction on Count Four, Whitfield pointed out that the grand jury had failed to allege the death results offense—charging only that Whitfield had forced Mrs. Parnell to accompany him without her consent and killed her. Therefore, according to Whitfield, the court's instruction and the Count Four allegations "do not match." *See id.* at 932. The court overruled the objection, explaining that the "death results" language did not need to be alleged because "the general reference of 2113(e) [in Count Four] triggers the instruction in . . . the [two] ways 2113(e) can be violated," i.e., "either by killing Mary Parnell or[ ] by knowingly forcing her to accompany him." *Id.* at 932-33. Moreover, the court explained that "if it's the latter," i.e., forced accompaniment, there would be "two

different ramifications. . . . One is forced accompaniment without death, and [the other is] forced accompaniment with death, and those have sentencing implications." *Id.* at 934-35.

The prosecution rested its case on the fourth day of trial after calling experts to testify about the nature and cause of Mrs. Parnell's death. Whitfield then moved for judgment of acquittal on Count Four, asserting that there was insufficient evidence to support a finding of guilt on that charge, because there was no evidence that he had killed Mrs. Parnell and there was no way to exclude other possible causes of her death. Whitfield also maintained that there was insufficient proof that he had "forced Mrs. Parnell to accompany him anywhere, or that such forced accompaniment caused her death." J.A. 1087. The court promptly denied the motion for acquittal, and, after calling a single witness—his own medical expert—Whitfield also rested. There was no rebuttal evidence. At that point, Whitfield renewed his motion for judgment of acquittal on Count Four, contending again that there was insufficient evidence to prove that his conduct proximately caused Mrs. Parnell's death. The court again denied the motion.

After the parties made their closing arguments, the district court charged the jury. As to Count Four, the court instructed that, in order for the jury to find Whitfield guilty, it had to be convinced beyond a reasonable doubt that:

> One, the defendant committed the offense alleged in Count One; that is attempted robbery of a credit union.

> Two, in avoiding or attempting to avoid apprehension for that offense, the defendant
>
> A, killed Mary Parnell.
>
> Or B, knowingly forced Mary Parnell to accompany him without her consent.

J.A. 1241. The court explained to the jury that Whitfield was "charged with violating this statute in two ways," and that the jury "must consider both whether the defendant killed Mary Parnell and/or whether he forced her to accompany him in avoiding or attempting to avoid apprehension for the attempted robbery." *Id.* at 1241-42. Significantly, the court then instructed the jury that,

> [w]ith respect to the second way of violating this statute, if you find that the defendant forced Mary Parnell to accompany him, *you must also decide whether that forced accompaniment resulted in Mary Parnell's death.*

*Id.* at 1242 (emphasis added).

Other Count Four instructions advised the jury that "the term 'forced accompaniment' includes[ ] forcing a person to move from one part of a building to another against her will" and "does not require . . . that the defendant crossed a property line, moved a person a particular number of feet, held a person for a particular period of time, or placed the person at a certain level of danger." J.A. 1242-43. Regarding the terms "'killed'" and "'resulted in death,'" the court clarified that the

government was "not required to prove that the defendant intended to kill Mary Parnell," but that the evidence was required to "prove that the defendant's actions in avoiding or attempting to avoid apprehension, were the proximate cause of her death," i.e., that Whitfield's conduct played "a substantial part in bringing about or actually causing the death of [Mrs. Parnell]." *Id.* at 1243.

During its deliberations, the jury asked several questions concerning Count Four, including inquiries concerning the issue of forced accompaniment and the definitions of "killed" and "resulted in death." When the court convened to discuss the jury's inquiries, Whitfield's counsel repeated his objection to the "entirety of the instruction[s]" on Count Four and specifically objected to the proposed "proximate cause instruction" on the "resulted in death" jury question. *See* J.A. 1259, 1265. The court responded that Whitfield had "not waiv[ed] any [earlier] objection," and that the court's rulings were "the law of the case now." *See id.* at 1259. Nevertheless, the court overruled Whitfield's objections and, in response to the jury's inquiries, referred it to the earlier instructions.

On November 20, 2009, the jury returned a verdict of guilty against Whitfield on Counts One through Three. On Count Four, the jury answered the verdict form's three-part inquiry as follows:

- Paragraph 4.a: "Not Guilty" on the 18 U.S.C. § 2113(e) charge of "killing Mary Parnell in avoiding or attempting to avoid apprehension for [the attempted bank robbery] alleged in Count One";

- Paragraph 4.b: "Guilty" on the § 2113(e) charge of "forcing Mary Parnell to accompany him in avoiding or attempting to avoid apprehension for [the attempted bank robbery] alleged in Count One"; and

- Paragraph 4.c: "Yes" to the question "did the forced accompaniment result in Mary Parnell's death?"

*See* J.A. 1270, 1340.[6] Following the jury's return of its verdict, Whitfield renewed his "earlier objection made during the charge conference, in that the language given to the jury is inconsistent with the charging documents, and that resulted in prejudice." *See id.* at 1274-75. The court overruled the objection.

On November 10, 2010, the district court sentenced Whitfield to life imprisonment on Count Four, which the court deemed to be "statutorily required." *See* J.A. 1625-26.[7] The court also imposed concurrent 240-month sentences on Counts One and Two, plus a consecutive sixty-month sentence on Count Three. The court entered

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6. As the verdict form somewhat confusingly recited, a response to Paragraph 4.c was only necessary if the answer to Paragraph 4.b was "yes." The only possible answers to Paragraph 4.b, however, were "Guilty" and "Not Guilty." *See* J.A. 1340.

7. Section 2113(e) of Title 18 authorizes a mandatory life sentence or the death penalty as punishment for the killing offense (on which the verdict was "Not Guilty"), as well as for the unindicted death results offense. The government, however, elected prior to trial not to seek the death penalty.

judgment on November 29, 2010, providing that, with respect to Count Four, Whitfield had been found guilty and was sentenced on the death results offense—that is, as the judgment recited, "[f]orced accompaniment while attempting to avoid apprehension for an attempted bank robbery resulting in death." *Id.* at 1632. Whitfield has timely appealed, and we possess jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

## II.

On appeal, Whitfield presents four contentions of error. First, Whitfield faults the district court for declining to suppress his confessions to the two Belmont home break-ins, which he argues were the product of coercive interrogations and thus involuntary. Second, he posits that two aspects of the jury instructions on Count Four regarding the forced accompaniment offense were plainly erroneous, in that they failed to instruct on a lesser-included offense and permitted the jury to convict on Count Four for a mere confinement (as opposed to a forced accompaniment). Third, Whitfield maintains that the court erred in instructing the jury on the death results offense not alleged in Count Four. Finally, Whitfield asserts that there was insufficient evidence to support his conviction on the forced accompaniment offense. We assess Whitfield's contentions in turn.

### A.

Whitfield first contends that the district court erred by declining to suppress his confessions to the two Belmont

home break-ins, especially the statements about his encounter with Mrs. Parnell. Whitfield agrees, of course, that the court properly suppressed his confession to the attempted bank robbery (a ruling not challenged by either party on appeal). He nevertheless maintains that his other two confessions should have been suppressed because the officers used coercive tactics in the interview process. In particular, Whitfield points out that, at the outset of the interview, "Detectives Sampson and Sumner led [Whitfield] to believe that their interest in questioning him was limited to [the two Belmont home break-ins]"—the "'lesser of the evils'"—not the forced accompaniment and death of Mrs. Parnell or the attempted bank robbery. *See* Suppression Order 2-3. Indeed, the court found that Whitfield "was misled throughout his interrogation regarding the seriousness of the charges against him." *Id.* at 8. Whitfield also emphasizes that he was "especially vulnerable to the [detectives'] coercive interrogation tactics," because, as the court observed, "[w]hen his questioning began, [Whitfield] was cold, wet, only 20 years' old, and had never before faced any serious charges." *Id.* at 9-10.

In considering whether a defendant's inculpatory statement was voluntary, we "must make an independent determination on the issue of voluntariness, [and accept] the district court's findings of fact on the circumstances surrounding the confession . . . unless clearly erroneous." *United States v. Khan*, 461 F.3d 477, 497 (4th Cir. 2006) (internal quotation marks omitted). In undertaking that review, we must specifically "determine whether the confession was extracted by any sort of threats or

violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." *United States v. Holmes*, 670 F.3d 586, 591 (4th Cir. 2012) (alterations and internal quotation marks omitted). "Even where threats, violence, implied promises, improper influence, or other coercive police activity exist," however, a confession may yet be voluntary unless "the defendant's will has been overborne or his capacity for self-determination critically impaired." *Id.* (internal quotation marks omitted). In that regard, we examine "the totality of the circumstances, including the characteristics of the defendant, the setting of the interview, and the details of the interrogation." *Id.* at 592 (internal quotation marks omitted).

To begin with, we are struck by the district court's perceptive and sensible differentiation between the two parts of the post-arrest interview of Whitfield. In stark contrast to the second part—which the court deemed "embarrassing to law enforcement" and "extremely coercive," J.A. 731—"the first part of that interview was [the] kind of police conduct that . . .is entirely appropriate, aggressive, trying to ferret out the truth of evidence of criminal activity," *id.* at 730. Although there were some "fairly minor discrepancies" in the detectives' testimony, the court specifically found them to be "credible" and their evidence "consistent[ ] and corroborated by the DVD of the interview." *Id.* at 172. Moreover, the court found that, during the first part of the interview, Whitfield was "conversational"; was "comfortable," though wet and cold; and, despite his youth and inexperience, generally "seemed intelligent" enough to decide "when to provide

information and when not to." *Id.* at 173. Notably, Whitfield has not argued—nor do we perceive—that any of the court's factual findings were clearly erroneous. We are therefore bound to accept those findings. *See United States v. Braxton*, 112 F.3d 777, 781 (4th Cir. 1997) (observing that we "accept[ ] the district court's findings of fact on the circumstances surrounding the confession . . . unless clearly erroneous" (internal quotation marks omitted)).

Whitfield's chief complaint is that the police officers deceived him about the offenses they were investigating, particularly those involving the forced accompaniment and death of Mrs. Parnell. Nevertheless, Whitfield concedes that the officers "had no duty to advise [him] of the identity of the specific offense under investigation" or "inform [him] of every potential theory of liability related to [his] conduct." *Braxton*, 112 F.3d at 784. Although Detectives Sampson and Sumner led Whitfield to believe that their only interest at the start of the interview was the Belmont home break-ins, Whitfield obviously knew that his interactions with Mrs. Parnell were the result of his breaking and entering of her home. Whitfield persists, however, that he could not have rationally assessed the consequence of confessing to the break-ins because Sergeant Reynolds had indicated that Mrs. Parnell was alive and had "ID'd" Whitfield. *See* J.A. 1296. Because of Reynolds' misrepresentations, Whitfield contends that he mistakenly believed that he was being investigated for only a minor crime.

As the Supreme Court has explained, "[p]loys to mislead a suspect or lull him into a false sense of

security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). Indeed, "misrepresentations are insufficient, in and of themselves, to render a confession involuntary." *Johnson v. Pollard*, 559 F.3d 746, 755 (7th Cir. 2009) (collecting cases); *accord Braxton*, 112 F.3d at 782-83 (concluding that investigator's statement "that you can do five years because you're not coming clean," did not result in involuntary confession). The determinative factor remains the question of whether such misrepresentations overbore the defendant's will. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969) ("[T]he fact that the police misrepresented the statements that [the codefendant] had made is, while relevant, insufficient . . . to make this otherwise voluntary confession inadmissible."). Put simply, we are satisfied —as was the district court—that Whitfield's capacity for self-determination was not critically impaired by Sergeant Reynolds's misrepresentations.[8]

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8. We are also satisfied that Whitfield's will was not overborne by Sergeant Reynolds encouraging him to talk, suggesting that Whitfield would do "nothing but help[ ] [himself]." *See* J.A. 1296. Contrary to Whitfield's assertions, Reynolds' vague, nondescript encouragement did not misrepresent the legal effect of confessing to his interactions with Mrs. Parnell. *See Rose v. Lee*, 252 F.3d 676, 686 (4th Cir. 2001) ("declin[ing] to hold that the cryptic promise that 'things would go easier' on [defendant] if he confessed amounts to unconstitutional coercion"); *see also United States v. Rutledge*, 900 F.2d 1127, 1128 (7th Cir. 1990) (concluding that confession was voluntary where police made "not quite truthful" statement that "'all cooperation is helpful,'" though confession actually exposed defendant to heavier sentence).

As a result, the totality of the circumstances support the district court's denial of suppression. During the first part of the police interview, Whitfield's statements pertaining to the two Belmont home break-ins—including his statements about interacting with Mrs. Parnell—were voluntarily made. *Cf. United States v. Byers*, 649 F.3d 197, 216 (4th Cir. 2011)(ruling that defendant's confession was not coerced, even though "detective's statements were somewhat equivocal," because, inter alia, defendant received *Miranda* warnings and police never told defendant he would not be charged with murder); *United States v. Gray*, 137 F.3d 765, 771 (4th Cir. 1998) (same, where defendant "initialed his understanding of each of his [*Miranda*] rights and signed a form indicating that he understood"; no law enforcement officer made "assurances, promises or inducements" to convince defendant that he "would in any way be immunized"; and there was no evidence that the officers had "engaged in any threats, violence, or improper suggestions about how [defendant's] testimony would be used").

B.

Whitfield next contends that the instructions on the forced accompaniment offense were plainly erroneous in two respects. First, he argues that the district court failed to instruct on a lesser-included offense, and, second, that the instructions permitted the jury to convict on a theory of mere confinement as opposed to an actual forced accompaniment. As Whitfield acknowledges, we must review these contentions for plain error because they are raised for the first time on appeal. *See United States v.*

*Robinson*, 627 F.3d 941, 953 (4th Cir. 2010). To satisfy the plain error standard, a defendant "must establish that the district court erred, that the error was plain, and that it 'affected his substantial rights.'" *Id.* at 954 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)) (alterations omitted). Even if those three prerequisites are met, "we retain discretion to deny relief; plain errors should only be corrected where not doing so would result in a miscarriage of justice, or would otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* (alterations, citations, and internal quotation marks omitted). In any event, "[w]e review for abuse of discretion both the district court's decision to offer an instruction and the content of that instruction." *United States v. Jinwright*, 683 F.3d 471, 478 (4th Cir. 2012).

1.

First, Whitfield asserts that the district court plainly erred in failing to instruct the jury that a conviction under § 2113(e) for forced accompaniment (with or without a resulting death) requires proof of a predicate § 2113(d) violation.[9] We have recognized § 2113(d) as a "lesser included offense" of the § 2113(e) offenses, such that "[a]ll of the elements required under § 2113(d) are elements under § 2113(e)." *United States v. Turner*, 389 F.3d 111, 121 (4th Cir. 2004); *accord United States v. Whitley*, 759 F.2d 327, 331 (4th Cir. 1985) (en banc). Nevertheless, the

9. Section 2113(d) punishes the "use of a dangerous weapon or device" to "assault[ ] any person or put[ ] in jeopardy the life of any person" during the commission or attempted commission of a bank robbery.

government maintains that no error occurred—much less a plain error—in that the lesser-included-offense instruction is not supported by the terms of § 2113(e) and does not fit the unique facts of this case. We need not reach or decide those points, however, because even if the court abused its discretion by failing to instruct on § 2113(d), and even if that assumed error was plain, it neither contravened Whitfield's substantial rights nor warrants the exercise of our discretion to correct it.[10]

As Whitfield acknowledges, an instructional error is harmless in circumstances where "the jury actually made an equivalent or identical finding pursuant to another instruction." *See United States v. Aramony*, 88 F.3d 1369, 1387 (4th Cir. 1996). By its guilty verdicts on Counts One through Three, the jury in this case found, inter alia, that Whitfield entered the credit union intending to commit a felony therein, namely, "taking [the credit union's money] from the person or presence of another, by force, violence, and intimidation," and that he then carried "a Smith & Wesson .357 caliber revolver and a CN Romarm 7.62x39 caliber assault rifle . . . in furtherance of [a] crime of violence." *See* J.A. 12-14, 1339. Such underlying conduct amply supports the proposition that, as required by § 2113(d), Whitfield used "a dangerous weapon" to "assault[ ]

10. Absent a superseding decision of the Supreme Court or our en banc Court, we cannot, in any event, revisit whether *Whitley* and *Turner* properly characterized § 2113(d) as a lesser included offense of § 2113(e). *See United States v. White*, 670 F.3d 498, 516 (4th Cir. 2012) (recognizing that "a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court" because that authority is vested in "the Supreme Court or this court sitting en banc").

[a] person or put[ ] in jeopardy the life of [a] person" during an attempted bank robbery. Indeed, we have long recognized that the act of "[b]randishing weapons during a robbery threatens victims and bystanders alike," sufficient to support a conviction under § 2113(d). *See United States v. Bennett*, 675 F.2d 596, 599 (4th Cir. 1982); *see also United States v. Harris*, 792 F.2d 866, 868 (9th Cir. 1986) (affirming convictions under 18 U.S.C. §§ 924(c) and 2113(d) where evidence established that defendant carried firearm during bank robbery).[11] As a result, we are satisfied that, even if a plain instructional error occurred, it did not "affect[ ] [Whitfield's] substantial rights." *See* Fed. R. Civ. P. 51(d)(2); *Olano*, 507 U.S. at 734.

Furthermore, even if Whitfield had been prejudiced by a plain instructional error, we would not exercise our discretion to notice the error. As we have explained, "central to the question of whether to notice a plain error affecting substantial rights is a determination of whether, based on the record in its entirety, the proceedings against the accused resulted in a fair and reliable determination of

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11. Whitfield contends that, because the credit union's lobby doors were locked and bulletproof, he had no "apparent present ability" to assault anyone and the credit union's employees had "no reason to fear or expect immediate bodily harm." *See United States v. Newkirk*, 481 F.2d 881, 883 n.1 (4th Cir. 1973). We will not speculate on whether the lobby doors and bulletproof glass were completely impenetrable or would have yielded had Whitfield and McCoy opened fire. Instead, we join the Second and Eleventh Circuits in rejecting the contention that bank tellers are not jeopardized simply because they are situated behind "bulletproof" glass. *See United States v. Tutt*, 704 F.2d 1567, 1568-69 (11th Cir. 1983); *United States v. Johnson*, 401 F.2d 746, 747 (2d Cir. 1968).

guilt." *United States v. Cedelle*, 89 F.3d 181, 185 (4th Cir. 1996). Based on the trial evidence—including Whitfield's confessions—the jury found that he forced Mrs. Parnell to accompany him without her consent. The evidence showed further that Mrs. Parnell reasonably feared Whitfield, and that Whitfield attempted to commit an aggravated armed bank robbery. In these circumstances, the failure to correct the assumed instructional error would not result in a miscarriage of justice or undermine the fairness or integrity of the trial proceedings. Rather, "it would be the reversal of a conviction such as this which would have that effect." *Johnson v. United States*, 520 U.S. 461, 470 (1997); *cf. Cedelle*, 89 F.3d at 186 (declining to correct trial court's error in failing to instruct jury on essential element because evidence "permit[ted] no other conclusion" but that defendant was guilty).

2.

Second, Whitfield contends that the district court plainly erred in failing to instruct the jury on the requirements of "a literal[ ] forced accompaniment" under § 2113(e). *See Turner*, 389 F.3d at 120. More specifically, Whitfield argues that the court erred by instructing that the § 2113(e) forced accompaniment offense "includes" such an accompaniment, rather than "requires" it. Whitfield also takes issue with the court's instruction that the jury need not find "that the defendant . . . *held* the person for a particular period of time," *id.* at 1242-43 (emphasis added), because that instruction suggests that a mere confinement is sufficient—a suggestion that the prosecution availed itself of by emphasizing in closing that Mrs. Parnell had been "held against her will," *see id.* at 1202-03.

We perceive no error in the district court's use of the word "includes" in its instruction on the meaning of forced accompaniment. A trial court has "considerable discretion in choosing the specific wording of [its] instructions," and we will not reverse unless an instructional error "is determined to have been prejudicial, based on a review of the record as a whole." *Figg v. Schroeder*, 312 F.3d 625, 640 (4th Cir. 2002) (internal quotation marks omitted). That is, "we do not view a single instruction in isolation; rather we consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *United States v. Rahman*, 83 F.3d 89, 92 (4th Cir. 1996). On the whole, the contested instruction—advising the jury that "the term forced accompaniment includes[ ] forcing a person to move from one part of the building to another against her will"—accurately sets forth the applicable law. *See* J.A. 1242. This instruction was appropriately contextualized to the facts of this case and, by employing the word "includes," fairly conveys that, although a defendant can force a person to accompany him "beyond the walls of [a building]," movement "from one part of the building to another" without consent is "literally" a forced accompaniment—consistent with our recognition that "§ 2113(e) includes no property-line or threshold requirement." *See Turner*, 389 F.3d at 119-20.[12]

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12. In rejecting the *Turner* defendant's contention that "only forcing someone out of a building, or perhaps taking hostages, can trigger the forced accompaniment of § 2113(e)," Judge Wilkinson astutely explained that, although "most forced accompaniments [might] include crossing the threshold[,] Congress can criminalize that which is uncommon, as it did in penalizing forced accompaniments occurring entirely inside [a building such as] a bank." 389 F.3d at 119.

Finally, we do not fault the district court for advising the jury that a forced accompaniment does *not* require that the victim be "held . . . for a particular time period," J.A. 1242, because the instruction contained language we have already approved, *see Turner*, 389 F.3d at 119 ("agree[ing] with the Eleventh Circuit that the text of [ § 2113(e)] contains 'no requirement that . . . she be held against her will for a particular time period'" (alterations omitted) (quoting *United States v. Bauer*, 956 F.2d 239, 241 (11th Cir. 1992))). In any event, the challenged instruction expressly disallows—rather than endorses—a mere confinement theory of forced accompaniment. In the circumstances, there was no instructional error made by the trial court, and this argument must also be rejected.

C.

Whitfield next contends that his Fifth Amendment right to be indicted by a grand jury was abridged because he was convicted of an offense not charged in Count Four—the death results offense. In essence, Whitfield asserts that the manner in which Count Four was tried, including the court's instructions on "death results" and the derivative verdict form, contravened the Grand Jury Clause by constructively amending Count Four.[13] We review de novo the legal question of whether there has been a constructive amendment of an indictment. *See United States v. Malloy*, 568 F.3d 166, 177 (4th Cir. 2009).

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13. The Grand Jury Clause of the Fifth Amendment provides, in pertinent part, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V.

*Appendix C*

1.

The government has maintained throughout this appeal that Count Four alleged the essential elements of the § 2113(e) offense of which Whitfield was convicted, arguing that the allegations omitted "only an enhancing element ['death results'] that the jury later found but was not used to support a sentence above the otherwise applicable statutory maximum." *See* Br. of Appellee 33.[14] As several courts have observed, however, the "death results" terminology in similar criminal statutes prescribes an offense element rather than a sentencing factor.

In *Jones v. United States*, the Supreme Court held that provisions of the carjacking statute, 18 U.S.C. § 2119—

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14. The government has nonetheless acknowledged in another court of appeals that "death results" is "an element of a crime separate from bank robbery," and not "a sentencing factor." *See* Final Br. of Appellee at 58, *United States v. Dorman*, No. 02-5127(L) (6th Cir. July 7, 2003). There, the government repudiated the contrary ruling of *United States v. Nelson*, 920 F. Supp. 825 (M.D. Tenn. 1996), which had concluded that "death results" serves only to enhance the penalty, not create a separate offense. The government further admitted in *Dorman* that *Nelson* was "directly at odds with the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)." Final Br. of Appellee at 58-59. Indeed, before the district court here, in opposition to Whitfield's motion to dismiss Count Four, the government vouchsafed—in line with its position in *Dorman*—that the holding in *Nelson* was "perhaps only possible pre-*Apprendi*." *See* J.A. 32. It is difficult to explain the government's retreat on appeal from its long-held position as anything other than a tactical maneuver driven by the exigencies of the tenuous litigation posture in which it finds itself.

authorizing more severe penalties when the carjacking involves "serious injury" or "death"—establish "separate offenses by the specification of distinct elements" that are not mere sentencing factors. *See* 526 U.S. 227, 251-52 (1999). Relying on *Jones*, we identified "death results" as a separate offense element of § 2119. *See United States v. Blake*, 571 F.3d 331, 351 (4th Cir. 2009). Consistent with *Jones*, we have also recognized that "death resulted" is an essential element of the offense of "kidnapping resulting in death" as defined in 18 U.S.C. § 1201(a), a statute structured similarly to § 2113(e). *See United States v. Lentz*, 524 F.3d 501, 512 (4th Cir. 2008). Our sister circuits have likewise construed analogous "death results" provisions. *See, e.g., United States v. Montgomery*, 635 F.3d 1074, 1087 (8th Cir. 2011) (kidnapping resulting in death, § 1201(a)); *Logan v. United States*, 434 F.3d 503, 508 (6th Cir. 2006) (arson resulting in death, 18 U.S.C. § 844(i)); *United States v. Rebmann*, 321 F.3d 540, 542 (6th Cir. 2003) (drug trafficking resulting in death, 21 U.S.C.§ 841(b)(1)(C)); *United States v. Friedman*, 300 F.3d 111, 127 (2d Cir. 2002) (racketeering violence resulting in death, 18 U.S.C. § 1952); *United States v. Rezaq*, 134 F.3d 1121, 1135-37, 328 U.S. App. D.C. 297 (D.C. Cir. 1998) (aircraft piracy resulting in death, 49 U.S.C. § 1472(n)(1)(B)).

We are unable to discern any reason to either interpret or apply § 2113(e) differently in this case. Rather, we are content to adhere to the Supreme Court's nomenclature and describe § 2113(e) as creating "separate offenses by the specification of distinct elements." *See Jones*, 526 U.S. at 252.[15] More specifically, the killing offense

15. It is no understatement to say that § 2113(e) is less than a model of clarity. The statute has been characterized as "capable

requires proof that a defendant "kill[ed] any person." The forced accompaniment offense necessitates proof that a defendant "force[d a] person to accompany him without the consent of such person." And the death results offense—although entailing the lesser-included forced accompaniment offense—requires further proof that "death result[ed]." Hence, by instructing on the uncharged death results offense, the district court constructively amended Count Four to "broaden[ ] the possible bases for conviction beyond those presented to the grand jury." *See United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994) (en banc). When such "a constructive amendment is found, the error is fatal and reversible per se." *Lentz*, 524 F.3d at 511.[16]

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of multiple interpretations, none of which is without problems." *See United States v. Parks*, 583 F.3d 923, 928 (6th Cir. 2009) (White, J., concurring). Indeed, § 2113(e) creates a variety of distinct offenses. For example, although evading apprehension for an attempted bank robbery was an element of Whitfield's Count Four conviction, other types of conduct may underlie a § 2113(e) offense. To illustrate, a defendant who, while attempting to rob a bank, shoots and kills a bank guard after a struggle for a gun would be guilty of "kill[ing] any person" in the course of "committing" attempted bank robbery. *See United States v. Bolden*, 545 F.3d 609 (8th Cir. 2008). And, a defendant who compels a bank employee into the bank vault and pressures her to fill a pillowcase with money before leaving her unharmed would be guilty of "forc[ing] any person to accompany him without the consent of such person" while "committing" bank robbery. *See Turner*, 389 F.3d at 119-20. Fortunately, for purposes of this appeal, we need not parse § 2113(e) for all of its conceivable offenses.

16. At oral argument in this appeal, the government explained that the prosecutors mistakenly believed that it

Of course, not every inconsistency "between an indictment and the proof offered at trial . . . constitute[s] a constructive amendment of an indictment." *United States v. Redd*, 161 F.3d 793, 795 (4th Cir. 1998). Short of a constructive amendment, a mere variance, for example, "occurs when the facts proven at trial support a finding that the defendant committed the indicted crime, but the circumstances alleged in the indictment to have formed the context of the defendant's actions differ in some way nonessential to the conclusion that the crime must have been committed." *Floresca*, 38 F.3d at 709. Such a variance "does not violate a defendant's constitutional rights unless it prejudices the defendant either by surprising him at trial and hindering the preparation of his defense, or by exposing him to the danger of a second prosecution for

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would be redundant for Count Four to allege both "kills" and "death results." This misinterpretation may explain Count Four's awkward inversion of the killing offense and the forced accompaniment offense from the order in which those offenses appear in § 2113(e). As we have explained, however, the killing offense and the death results offense consist of different elements. Otherwise, the Violent Crime Control and Law Enforcement Act of 1994—which added the "death results" provision to § 2113(e) notwithstanding the preexisting "kills" offense—would have been pointless. And we are unable to so construe a statutory enactment. *See PSINet, Inc. v. Chapman*, 362 F.3d 227, 232 (4th Cir. 2004) (observing that "[g]eneral principles of statutory construction require a court to construe all parts to have meaning and to reject constructions that render a term redundant"). In any event, the government has abandoned the argument that "death results" is subsumed by "kills," as it seeks affirmance of the death results offense conviction even though Whitfield was acquitted of the killing offense.

the same offense." *United States v. Ashley*, 606 F.3d 135, 141 (4th Cir. 2010). Furthermore, an indictment can be amended without further consideration by the grand jury when it is necessary to strike surplusage, *see id.* at 142; *United States v. Ford*, 986 F.2d 57, 59 (4th Cir. 1993), or to correct the indictment's form, e.g., a misnomer, *see United States v. Snowden*, 770 F.2d 393, 398 (4th Cir. 1985), or a typographical error, *see United States v. Morrow*, 925 F.2d 779, 781 (4th Cir. 1991).

In much the same fashion as it sought to downplay the constructive amendment in *Floresca* as a variance, the government suggested during the oral argument of this case that the Count Four allegations constituted no more than an "indictment error" within the meaning of *Higgs v. United States*, 353 F.3d 281 (4th Cir. 2003). In *Higgs*, we defined an indictment error as "the failure of an indictment to allege an element of a charged offense." *Id.* at 306. After concluding that the indictment was adequate in that case, we went on to observe, albeit in dicta, that any assumed indictment error would nevertheless be subject to harmless error review.

Although the distinction between a constructive amendment and a *Higgs*-type indictment error may be nuanced, the difference is appreciable in this case. Here, there was substantially more than a simple neglect "to allege an element of a charged offense." Indeed, the killing offense and the forced accompaniment offense were properly charged with all of their essential elements and, thus, there was no defect in the Count Four allegations. The error arose not from the indictment's omission of an element of a charged offense but from the district court's

instructions on an element of an *uncharged offense*—the death results offense—on which Whitfield "was ultimately convicted and sentenced." *See Higgs*, 353 F.3d at 306 (recognizing practical distinction between indictment error and constructive amendment). The result was an archetypical constructive amendment.

Moreover, it cannot be fairly said that the decision to allege Count Four as it is drawn, specifying only the killing offense and the forced accompaniment offense, was other than intentional. The prosecution's proposed instruction on Count Four was consistent with Count Four's allegations, and did not mention the death results offense. In addition, while opposing Whitfield's motion to dismiss Count Four, the government correctly emphasized that it had "charged" the two § 2113(e) offenses of "'killing' and 'forced accompaniment' in the conjunctive, but it [was entitled to] prove them in the disjunctive." *See* J.A. 23.[17] Thus, to the extent that the grand jury's charge can be said to have resulted in "indictment error," it was not error premised on a mistake of perception, i.e., an oversight as occurred in *Higgs*, but the prologue to legal error occasioned by the district court's inconsistent instructions.

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17. The government's position in that regard was consistent with the structure of § 2113(e), which spells out its separate offenses in the disjunctive ("or"). And, of course, "[i]t is well established that when the Government charges in the conjunctive, and the statute is worded in the disjunctive, the district court can instruct the jury in the disjunctive." *United States v. Perry*, 560 F.3d 246, 256 (4th Cir. 2009). As a result, the killing offense and the forced accompaniment offense were properly charged in Count Four and the court appropriately instructed on those offenses, employing the disjunctive.

*Appendix C*

"To constitute a constructive amendment," the incongruity must in fact "change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment." *See Ashley*, 606 F.3d at 141. A broadening of the alleged charges is precisely what occurred in this case when the district court instructed the jury on the death results offense. Simply put, an "indictment may not be [so] amended except by resubmission to the grand jury." *Russell v. United States*, 369 U.S. 749, 770 (1962). In deference to the exclusive province of the grand jury to amend the charges in an indictment, "in this circuit constructive amendments are erroneous per se and require reversal regardless of preservation." *United States v. Robinson*, 627 F.3d 941, 958 (4th Cir. 2010) (citing *United States v. Foster*, 507 F.3d 233, 242-43 (4th Cir. 2007); *Floresca*, 38 F.3d at 714). Or, as more succinctly put by our friend Judge Hall, a constructive amendment is "not subject to review for harmlessness." *Floresca*, 38 F.3d at 712.

2.

Even if this case involved an indictment error subject to harmless error review, we would yet vacate Whitfield's conviction and mandatory life sentence on the death results offense. The government argues that any Fifth Amendment violation was harmless because Whitfield's life sentence "was within the statutory range" and "fully supported by the elements alleged and found by the jury beyond a reasonable doubt." Br. of Appellee 33. As Whitfield correctly observes, however, the government's focus on

the sufficiency of the evidence is misplaced, inasmuch as to demonstrate harmlessness in the sentencing context, it "must prove beyond a reasonable doubt that the court would have imposed the same sentence in the absence of the constitutional error." *See United States v. Shatley*, 448 F.3d 264, 267 (4th Cir. 2006); *see also United States v. Mackins*, 315 F.3d 399, 409 (4th Cir. 2003) (reviewing preserved error for harmlessness and concluding that defendant's substantial rights were affected by receiving life sentence when Guidelines mandated ninety-year sentence).

The government simply cannot make the required showing here. The district court believed that it was statutorily mandated to sentence Whitfield to life imprisonment on the death results offense, and the court never indicated that it would have imposed that same sentence had a more lenient alternative been available. In that circumstance, the "sentencing court's silence must be interpreted in favor of [Whitfield]." *See United States v. Rodriguez*, 433 F.3d 411, 416 (4th Cir. 2006) (adjudging preserved statutory *Booker* error as prejudicial where court did not indicate that it might have imposed different sentence if Guidelines were advisory).

Consequently, whether we deem the district court's error a constructive amendment or an indictment error, we reach the same result—vacatur of Whitfield's conviction of the death results offense and the resulting mandatory life sentence. On remand, the court will be obliged to amend the judgment to reflect Whitfield's conviction on the forced

accompaniment offense charged in Count Four, and then resentence him accordingly.[18]

D.

Finally, Whitfield contends that there was insufficient evidence for the jury to find beyond a reasonable doubt that he forced Mrs. Parnell to accompany him without her consent, within the meaning of the forced accompaniment offense in § 2113(e).[19] In "reviewing a sufficiency-of-the-evidence claim, we will sustain the jury's verdict if there is substantial evidence, taking the view most favorable to the Government, to support it." *United States v. Hackley*, 662 F.3d 671, 683 (4th Cir. 2011) (internal quotation marks omitted). "Substantial evidence," as we have explained, "is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

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18. As reflected on the verdict form, Whitfield was also convicted of the forced accompaniment offense. That conviction stands, being unaffected by the constructive amendment. On remand, the district court must therefore resentence Whitfield on his Count Four conviction of the forced accompaniment offense, which carries a "mandatory minimum of ten years" and "an unstated statutory maximum [that] grants discretion to sentence up to life in prison." *See Turner*, 389 F.3d at 120 (affirming sentence of life imprisonment for forced accompaniment offense without resulting death).

19. Because we vacate Whitfield's conviction of the death results offense, we need not consider his challenge to the sufficiency of the evidence on that unindicted aspect of this case.

*Appendix C*

Whitfield asserts that the prosecution failed to produce any evidence that he had threatened Mrs. Parnell as a means of forcing her to accompany him and, in the light most favorable to the government, established only that he had "guided" or "asked" her to go into the computer room. We are entirely unpersuaded by this argument, and decline to accept that an ostensible "request" by a physically agile twenty-year-old male attempting to evade apprehension for an attempted bank robbery constitutes anything less than a real threat, particularly when aimed at a fragile seventy-nine-year-old woman during a terrifying invasion of her home. Indeed, there was ample evidence that Whitfield wanted to position Mrs. Parnell in the computer room where they could not be seen by the police. Whitfield admitted that he directed Mrs. Parnell to the computer room. And, when she attempted to defy his instructions by insisting that he leave the home, Whitfield required Mrs. Parnell to stay in the computer room, at which point "she sat down in the chair," where she was found dead. J.A. 1460. Although Whitfield required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period, no more is required to prove that a forced accompaniment occurred. *See Turner*, 389 F.3d at 119-20 (affirming forced accompaniment conviction where defendant compelled bank manager to accompany him to bank's vault); *cf. United States v. Osborne*, 514 F.3d 377, 390 (4th Cir. 2008) (approving Guidelines abduction enhancement where robber moved employees from back to front of store).[20]

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20. Our interpretation of a forced accompaniment comports with the decisions of our sister circuits. *See, e.g., United States v. Strobehn*, 421 F.3d 1017, 1020 (9th Cir. 2005) (affirming forced

*Appendix C*

III.

Pursuant to the foregoing, we vacate Whitfield's conviction and sentence on the uncharged death results offense, and remand for entry of a judgment of conviction on the Count Four forced accompaniment offense and for appropriate resentencing proceedings. We affirm the judgment in all other respects.

*AFFIRMED IN PART,*

*VACATED IN PART,*

*AND REMANDED*

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accompaniment conviction of defendant who forced bank employee to open door and lie face down on floor inside bank); *United States v. Reed*, 26 F.3d 523, 527 (5th Cir. 1994) (same); *Bauer*, 956 F.2d at 241 (11th Cir. 1992) (upholding forced accompaniment conviction for defendant who compelled two people to walk with him from back to front of bank).

## APPENDIX D — AMENDED JUDGMENT IN A CRIMINAL CASE IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, FILED NOVEMBER 20, 2012

United States District Court
For The Western District of North Carolina

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA

v.

LARRY WHITFIELD
(Name of Defendant)

Case Number: DNCW309CR000009-001
USM Number: 22691-058

Erin Teylor, Kevin Tate
Defendant's Attorney

**Filed Date of Original Judgment: 11/29/10**
**(Or Filed Date of Last Amended Judgment)**
**Reason for Amendment:**

X Correction of Sentence on Remand
(18 U.S.C. § 3742(f)(1) and (2))

* * *

**ACCORDINGLY,** the court has adjudicated that the defendant is guilty of the following offense(s):
THE DEFENDANT:

*Appendix D*

__Pleaded guilty to count(s).

__ Pleaded nolo contendere to count(s) which was accepted by the court.

_x_ was found guilty on count(s) 1-4 after a plea of not guilty.

| Title and Section | Nature of Offense | Date Offense Concluded | Counts |
|---|---|---|---|
| 18:2113(a) | Attempted bank robbery and aiding and abetting the same (18:2) | 9/26/08 | 1 |
| 18:924(c)&(o) | Conspiracy to possess with intent to use and carry one or more firearms during and in relation to a crime of violence | 9/26/08 | 2 |
| 18:924(c) | Knowingly and unlawfully use and carry of a firearm during and in relation to a crime of violence and aiding and abetting the same (18:2) | 9/26/08 | 3 |

*Appendix D*

| | | | |
|---|---|---|---|
| 18:2113(e) | Forceful accompaniment while attempting to avoid apprehension for an attempted bank robbery | 9/26/08 | 4 |

The Defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 reference to Booker, and 128 U.S.C. 3553(a).

* * *

**IT IS ORDERED** that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence : 10/31/12

/s/
Robert J. Conrad, Jr.
Chief United States District Judge

*Appendix D*

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Count 4: TWO HUNDRED SIXTY-FOUR (264) MONTHS. Counts 1 & 2: TWO HUNDRED FORTY (240) MONTHS each count to run concurrently and concurrently with Count 4. Count 3: SIXTY (60) MONTHS to run consecutively to Counts 1,2 & 4.

X The Court makes the following recommendations to the Bureau of Prisons:

– Participation in Inmate financial Responsibility Program.

– Designation as close as possible to NC or VA consistent with the needs of BOP.

X The Defendant is remanded to the custody of the United States Marshal.

* * *

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Counts 3 & 4: FIVE (5) YEARS each count to run concurrently. Counts 1 & 2: THREE (3) YEARS each count to run concurrently and concurrently with Counts 3 & 4.

* * *

*Appendix D*

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

| ASSESSMENT | FINE | RESTITUTION |
|---|---|---|
| $400.00 | $0.00 | $1,495.78<br>***Total outstanding balance of Restitution due and remains in effect*** |

### FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

* * *

*Appendix D*

## COURT APPOINTED COUNSEL FEES

* * *

X The defendant shall pay $1,000.00 towards court appointed fees.

## RESTITUTION PAYEES

The defendant shall make restitution to the following payees in the amounts listed below:

| NAME OF PAYEE | AMOUNT OF RESTITUTION ORDERED |
|---|---|
| Wilson Nguyen | $1,495.78 |

X Joint and Several

X Defendant and Co-Defendant Names and Case Numbers *(including defendant number)* if appropriate: Quanterrious McCoy, 3:09cr00009-002

X Court gives notice that this case may involve other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered here in and may order such payment in the future.

X The victims' recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victim(s) receive full restitution.

* * *

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

B X Payment to begin immediately (may be combined with X (D) below);

* * *

D X Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $ 50.00 To commence 60 (E.g. 30 or 60 days) after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

*Appendix D*

**Special instructions regarding the payment of criminal monetary penalties:**

**X** **The defendant shall pay the cost of prosecution.**

* * * *

## APPENDIX E — BILL OF INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED JANUARY 23, 2009

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:09CR09-C

UNITED STATES OF AMERICA

v.

LARRY WHITFIELD, QUANTERRIOUS McCOY

Violations:
18 U.S.C. § 2113(a)
18 U.S.C. § 2113(e)
18 U.S.C. § 924(o)
18 U.S.C. § 924(c)
18 U.S.C. § 2

### BILL OF INDICTMENT

### THE GRAND JURY CHARGES:

### COUNT ONE

On or about September 26, 2008, in Gaston County, within the Western District of North Carolina, and elsewhere, defendants,

*Appendix E*

**LARRY WHITFIELD, and**
**QUANTERRIOUS McCOY**

aiding and abetting each other, did knowingly enter and attempt to enter Fort Financial Credit Union, 1475 North New Hope Road, Gastonia, North Carolina, a credit union whose deposits were then insured by the National Credit Union Administration Board, with intent to commit therein a felony affecting that credit union, that is, the taking, from the person or presence of another, by force, violence, and intimidation, money or any other thing of value belonging to or in the care, custody, control, management, or possession of that credit union, in violation of a 18 U.S.C. § 2113(a).

All in violation of Title 18, United States Code, Sections 2113(a) and 2.

**COUNT TWO**

On or about September 26, 2008, in Gaston County, within the Western District of North Carolina, and elsewhere. defendants,

**LARRY WHITFIELD, and**
**QUANTERRIOUS McCOY**

did knowingly and intentionally combine, conspire, confederate and agree to knowingly and unlawfully use and carry one or more firearms during and in relation to a crime of violence, that is, bank robbery, as charged in COUNT ONE of this Indictment, and to knowingly and intentionally possess one or more of said firearms in

furtherance of such crime of violence, a violation of Title 18, United States Code, Section 924(c).

## OVERT ACTS

In furtherance of the conspiracy and to effect the objects of the conspiracy, the following overt acts, among others, were committed in the Western District of North Carolina by one or more conspirators on September 26, 2008:

1. Defendant Larry Whitfield armed himself with a firearm.

2. Defendant Quanterrious McCoy armed himself with a firearm.

3. Defendants traveled together in a motor vehicle to the Fort Financial Credit Union.

4. Defendant Larry Whitfield entered the premises of the Fort Financial Credit Union with a firearm.

5. Defendant Quanterrious McCoy stood at the outside door of the Fort Financial Credit Union with a firearm while co-defendant Larry Whitfield attempted to enter the building.

All in violation of Title 18, United States Code, Section 924(o).

*Appendix E*

## COUNT THREE

On or about September 26, 2008, in Gaston County, within the Western District of North Carolina, and elsewhere, defendants,

**LARRY WHITFIELD, and**
**QUANTERRIOUS McCOY**

during and in relation to a crime of violence, that is, bank robbery, as charged in COUNT ONE of this Indictment, for which the defendants may be prosecuted in a court of the United States, did knowingly and unlawfully use and carry one or more firearms, that is, a Smith & Wesson .357 caliber revolver and a CN Romarm 7.62x39 caliber assault rifle, and in furtherance of such crime of violence did possess one or more of said firearms, and did aid and abet each other.

All in violation of Title 18, United States Code, Sections 924(c) and 2.

## COUNT FOUR

On or about September 26, 2008, in Gaston County, within the Western District of North Carolina, defendant,

**LARRY WHITFIELD**

did knowingly enter and attempt to enter Fort Financial Credit Union, 1475 North New Hope Road, Gastonia, North Carolina, a credit union whose deposits were then insured by the National Credit Union Administration

Board, with intent to commit therein a felony affecting that credit union, in violation of 18 U.S.C. § 2113(a), a statute of the United States, as set forth in COUNT ONE of this Indictment; and in avoiding or attempting to avoid apprehension for said offense, forced M.P. to accompany him without her consent, and killed M.P.

In violation of Title 18, United States Code, Section 2113(e).

**NOTICE OF FORFEITURE AND FINDING OF PROBABLE CAUSE**

Notice is hereby given of the provisions of 18 U.S.C. § 924(d) and the statutes incorporated or referred to therein. The firearms listed below are subject to forfeiture in accordance with § 924(d) because they were involved in, used, or intended to be used in the violations alleged in COUNT ONE, COUNT TWO, and COUNT THREE of this indictment:

1. A Smith & Wesson .357 caliber revolver, serial number DBH8219;

2. A CN Romarm 7.62x39 caliber assault rifle, serial number AB-1024-63.

A TRUE BILL:

GRETCHEN C.F. SHAPPERT
UNITED STATES ATTORNEY

/s/
ADAM MORRIS
ASSISTANT UNITED STATES ATTORNEY

## APPENDIX F — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, DATED NOVEMBER 16, 2009

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:09-CR-9

UNITED STATES OF AMERICA

vs.

LARRY WHITFIELD

VOLUME I of V

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE
ROBERT J. CONRAD, JR.
UNITED STATES CHIEF DISTRICT
COURT JUDGE
NOVEMBER 16, 2009

### EXCERPT OF PARNELL DIRECT

* * *

[71] Q. (Mr. O'Malley) What's shown in that photograph, Mr. Parnell?

*Appendix F*

A. This is taken from the living room, showing the hallway.

Q. Is that the area that you next went into --

A. Yes.

Q. -- after having gone through the dining room, the kitchen, the garage, the backyard?

A. That's the way I traveled, seeing if I could find her.

Q. And what happened as you went through down the hallway?

A. As I got down the hallway, there is a computer room, an office room about 8 feet down the hallway on the right. As I got to that doorway, I saw her sitting in a chair at the desk, with her chin on her chest, not moving, her eyes were closed. And I observed in that position I knew immediately there was trouble.

(Thereupon, Government Exhibit 29z was marked for identification.)

Q. (Mr. O'Malley ) Let me ask you please take a look at Government Exhibit 29z. Do you recognize this photograph?

A. Yes, I do.

MR. O'MALLEY: Your Honor, move Government Exhibit 29z into evidence.

*Appendix F*

THE COURT: Any Objection?

[72] MS. TAYLOR: No, Your Honor.

THE COURT: Let it be admitted.

(Thereupon, Government Exhibit 29z was received into evidence.)

Q. (Mr. O'Malley) Now, is this a view to the right of the hallway coming in off the living area?

A. Yes, it is.

Q. And what room is on the left side of this photograph?

A. That's the office computer room that I mentioned is where I found Mary sitting in the chair.

Q. Let's talk about the room a little bit first. There is a desk up against the wall; correct?

A. That is correct.

Q. What desk is that?

A. That's my work desk.

Q. There is a chair there, correct?

A. That is correct.

*Appendix F*

Q. Now, there is another sort of desk, a corner of which is shown in the left side of that photograph, correct?

A. That's a computer desk.

Q. Is there a computer there?

A. Yes, there is.

Q. Now, and there's a chair in front of the computer desk?

A. That is correct.

Q. Which of those chairs did you find your wife?

[73] A. Found her in tbe chair with the arms on it. It was typically placed up against the working desk.

Q. Now, is that a chair she normally sat in?

A. She did not. She sat in one at the computer.

Q. When you came in there, was the computer on?

A. I don't recall, sir.

Q. Now you indicated you saw your wife in the chair that's by the -- your work desk, correct?

A. Yes. She was sitting in the chair. The chair was backed up to the work desk facing the door.

*Appendix F*

Q. So which way was she facing?

A. She was facing the door.

Q. Facing you as you came in?

A. As I came in.

Q. And how did -- how was she sitting in that chair?

A. She was sitting there with her hands folded in her lap. Her chin down on her chest. Her eyes were closed.

Q. What did you do when you observed that?

A. I immediately went to her, lifted up her chin to make some movement to see if I could detect what the trouble was. She gave no -- gave no symptoms of any activity, life, at all. So I immediately moved her from the chair, laid her on the floor, started to do CPR. It dawned on me to dial 911 first. So I.

* * * *

# APPENDIX G — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, DATED NOVEMBER 17, 2009

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:09-CR-9

UNITED STATES OF AMERICA

vs.

LARRY WHITFIELD

VOLUME II of V

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE
ROBERT J , CONRAD, JR.
UNITED STATES CHIEF DISTRICT
COURT JUDGE
NOVEMBER 17, 2009

**EXCERPTS OF SANDERS DIRECT**

* * *

*Appendix G*

Ma'am, I would like to get away from your statement for a second, ask you a few questions about your trip, and your conversations with the defendant.

Did you ever talk to anyone else while you were on the phone with him?

A. Yes, sir.

Q. Who did you talk to?

A. I spoke with Ms. Parnell.

Q. You had a conversation with her?

A. Just briefly, about where I was, my location.

Q. And what was the purpose of that conversation?

A. So that I could get to where Mr. Whitfield was.

Q. How did she sound to you in that conversation?

A. She sounded calm, actually.

Q. She sounded calm?

A. Yes, sir.

[461] Q. Did the defendant tell you anything about his interactions with Mrs. Parnell before he spoke to you, or before he put her on the phone?

*Appendix G*

A. The only way I knew about his interaction with Ms. Parnell is when he actually said, it sounded like someone was coming into the room. And she came in. He said that, you know, to just calm down. Because he was actually just probably more scared than she was.

Q. You're saying she told him to calm down?

A. No, sir. He said, ma'am, just calm down. I'm probably more scared than you are, and I'm actually just trying to leave.

Q. So could you hear Mrs. Parnell in the background?

A. No, sir. There was nothing in the background.

Q. Could you -- well, you said the defendant just said, I'm more scared than you?

A. Right.

Q. Did you talk to Mrs. Parnell? Did she sound scared to you?

A. Afterwards.

Q. Let's start at the beginning. When you began speaking to her, how did she sound?

A. When I began speaking to her, she sounded calm. Before I spoke with her, when he was giving me the directions. He was giving me the directions wrong, the

wrong way. And she [462] was telling him the right way that I could go. And so that's when I spoke with her briefly about how to get to her address, and she sounded calm.

Q. Well, so -- are you saying that she was calm in the background when giving directions, and calm on the phone with you?

A. Right.

Q. Did he say -- the defendant say anything to you indicating that she wasn' t calm?

A. No, sir.

Q. I would like to go through your statement with you again, this is the statement you gave to Detective --

MR. TATE: Your Honor. I object at this point. This is not her statement. It's Detective Sampson's.

THE COURT: I will sustain the objection. But you can impeach with the statement, if that's your purpose.

MR. MORRIS: That is my purpose. I'm not offering --

THE COURT: You can ask her if she said something different on a different occasion.

MR. MORRIS: Your Honor, may we be heard at side bar?

THE COURT: Sure.

*Appendix G*

(Bench conference as follows:)

MR. MORRIS: I got more things, but the first is, [463] she indicated that she read through the statement.

THE COURT: Right.

MR. MORRIS: It was her statement.

THE COURT: I'm not sustaining his objection because it's the officer's statement. It's her statement. But it's not under oath. It's an out of court statement. And so I sustained the objection on hearsay grounds. I think you're entitled to impeach her with it, that on a separate occasion she said something different.

MR. MORRIS: Okay.

THE COURT: But you can't read it. You can say, on such and such a date, did you say such and such.

MR. MORRIS: Well, but I think the jury is entitled to know that the contradiction is on a particular issue, and not just, he said something different at another time.

THE COURT: You can impeach with a statement. You can't just read the statement. That's not impeachment.

MR. MORRIS: I wasn't planning on reading.

THE COURT: No, you said at one point -- you said, well, let me go through the statement. So I sustained the objection.

You can refresh her recollection. You can impeach her with it, but you just can't read it. If you're doing something proper with it, I'll allow.

[464] MR. MORRIS: Well -- yes, sir.

(The bench conference was concluded.)

MR. MORRIS: May I have just a brief moment with Mr. O'Malley?

THE COURT: Sure.

Q. (Mr. Morris) Ma'am, when you spoke to Gaston County Police Officer Sampson, do you recall telling him that Mrs. Parnell wasn't calm?

A. No, sir.

Q. You don't recall that?

A. No, sir.

Q. Would it refresh your recollection if we could take a look at your statement?

A. Yes, sir.

Q. Would you please read what's been marked, but not admitted, as Government Exhibit 42 to yourself?

A. I'm sorry?

Q. Read it to yourself, please.

MR. TATE: Is this on the screen?

MS. TAYLOR: It was.

THE JURY: Yes.

THE COURT: All right. Members of the Jury, if there was a statement on the screen that has not been admitted into evidence, strike it at this time and ask you to disregard it and just listen to the questioning. May be [465] better to give her the hard copy of the statement at this time.

MR. MORRIS: Certainly. May I approach then?

THE COURT: You may.

MR. MORRIS: (Handing paper writing to the witness.) (Pause.)

Q. (Mr. Morris) Are you through reading it, ma' am?

A. I'm done.

Q. That refresh your recollection, ma' am, about what you told the officer --

A. What I told the officer, and what he wrote down was, what I told him was, when she walked into the room and

Mr. Whitfield said, ma'am, I'm probably more scared than you are. I told him that I believed that she was afraid at first. But after I spoke to her, she calmed down. That's what I told the officer.

Q. And let me interrupt you.

A. Um-hmm.

Q. You said she was afraid at first. Why?

A. Because Mr. Whitfield said, ma'am, calm down. I'm probably more afraid than you are.

Q. You heard Mr. Whitfield say that to her?

A. Right.

Q. Trying to calm her down?

[466] A. Right.

Q. So she wasn't calm at the start?

MR. TATE: Objection.

THE COURT: Overruled.

MR. TATE: Lack of personal knowledge.

THE COURT: Overruled.

THE WITNESS: I'm sorry.

Q. (Mr. Morris) I said, so she wasn't calm at the start?

A. That was my assumption, because he told her that.

Q. No, ma'am, listen to my question. I asked you a second ago, if you heard him telling her to calm down?

A. Yes, sir.

Q. You heard him say that?

A. Yes, sir.

Q. Did you hear her response to that?

A. No, sir.

Q. But you heard him telling her that?

A. Right.

MR. TATE: Objection; asked and answered.

THE COURT: Overruled.

Q. (Mr. Morris) And you heard him trying to calm her down --

MR. TATE: Objection.

Q. (Mr. Morris) What did he say?

A. He said, ma'am, I'm probably more afraid than you are.

[467] Q. Did you hear him say anything else?

A. No, sir.

Q. Did you hear anything from her while he was on the phone with her?

A. No, sir.

Q. You just heard what he was saying?

A. Right.

Q. But it was, ma'am, calm down?

A. Right.

Q. And did you say anything -- did the defendant say what he thought was happening to Mrs. Parnell?

MR. TATE: Objection, as to what he thought.

THE COURT: No. The question was, did the defendant say what he thought was happening to Mrs. Parnell. That's a proper question. I'll overrule the objection.

THE WITNESS: I'm sorry?

Q. (Mr. Morris) Did the defendant say to you what he thought was happening to Mrs. Parnell?

A. After I spoke with her?

Q. Yes.

A. A little after I spoke with Mrs. Parnell and she gave me the directions, I told Mr. Whitfield if the street was blocked off --

Q. No, ma'am. I'm sorry. I have to interrupt you. I asked if the defendant said anything to you about what he --

[468] A. Yes, sir.

Q. What did he say?

A. He said it looked like she wasn't breathing.

Q. Ma'am, did you tell Detective Sampson something different when you talked to Detective Sampson on the 29th?

A. I told the detective that Mr. Whitfield said that he thought Mrs. Parnell had had a heart attack, because it didn't look like she was breathing.

Q. Is that what he said to you?

A. Yes, sir.

Q. And when he told you that, what did you say to him?

A. I told him to step outside in the hallway, and just give her a minute.

Q. And did you tell him to do anything else?

A. And I believe I mentioned calling an ambulance, but I'm not sure.

Q. Would it refresh your recollection to take a look at Government Exhibit 42, your statement?

A. No, sir.

Q. Do you remember saying anything about an ambulance?

A. I believe I mentioned it, yes, sir.

Q. Did you tell Detective Sampson in December 2008 that you advised him to call an ambulance?

A. Yes, sir.

Q. Did the defendant ever tell you that he was going to [469] call an ambulance?

A. No, sir.

Q. What did he say to you after -- after he said that she wasn't breathing and had a heart attack, or he thought she had a heart attack, and after you advised him to call an ambulance, what did he say?

A. He said that someone was knocking on the door and that he would call me back.

Q. What did he say to you about Mrs. Parnell, after telling you that he thought she was having a heart attack and she wasn't breathing?

A. He told me he was scared.

Q. Did you talk to Detective Sampson on December 29th and tell him that the defendant said something else?

A. No, sir.

Q. You didn't tell Detective Sampson that the defendant said that he believed that Mrs. Parnell was dead?

A. Oh, yes, sir.

Q. You did say that?

A. Yes, sir.

Q. And did the defendant say that to you on the phone that day?

A. Yes, sir.

Q. How times did he call you that day?

A. I believe it was three times.

* * * *

# APPENDIX H — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, DATED NOVEMBER 18, 2009

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:09-CR-9

UNITED STATES OF AMERICA

vs.

LARRY EMANUEL WHITFIELD

VOLUME III OF V

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE
ROBERT J. CONRAD, JR.
UNITED STATES CHIEF DISTRICT
COURT JUDGE
NOVEMBER 18, 2009

## EXCERPTS OF SANDERS CROSS

* * *

[529] Q. But you didn't know the nature and circumstances of his trouble?

A. No, sir.

Q. Now at a certain point did you talk to a woman on the phone?

A. Yes, sir.

Q. And describe the nature of that conversation and what occurred?

A. Well, when I got stuck in the dead end and I was speaking to Mr. Whitfield about where I was, he was asking Miss Parnell -- he was telling her where I was. And she was giving him direction on what to tell me.

And then when he was telling me the wrong way, I heard her say, you know, that's incorrect. So I asked him, could I speak to her.

Q. You audibly heard her say that's not correct?

A. Right.

Q. As he was relaying the information to you?

A. Right.

Q. And did you eventually talk to her?

A. Yes, sir.

Q. And what if anything did she tell you?

A. She just told me -- I told her where I was. And she told me how to get to her street.

Q. And was it -- were you a long distance away?

[530] A. No, sir.

Q. Well, how many turns were involved in the instructions that she gave you?

A. Maybe like three turns at the most.

Q. And how long did you talk to Miss Parnell?

A. Briefly, just maybe like a minute or two.

Q. In your opinion, how did she sound to you?

A. She sounded calm, like relieved that I was nearby.

Q. She sounded like she wanted to you find out -- find where she was?

A. Right.

Q. Get Mr. Whitfield?

A. Um-hmm.

Q. And at some point you testified on direct that Mr. Whitfield said that she was in some discomfort or something had occurred?

A. Yes, sir.

Q. Was that during the conversation you had with her or afterwards?

A. That was afterwards.

Q. And were you still on the phone with Mr. Whitfield?

A. Yes, sir.

Q. Had you ever hung up after talking to Ms. Parnell?

A. No, sir.

Q. So you stayed on the phone continuously after she gave [531] you directions?

A. Right.

Q. And were you driving, looking for the residence at that time?

A. Yes, sir.

Q. And what if anything happened, what did -- Mr. Whitfield tell you that caused you to feel that there was some trouble?

A. Well, when I got to the actual street that she lived on, the street was blocked off. And I told Mr. Whitfield that I couldn't get to the actual residence because it was blocked off.

Q. What do you mean, blocked off?

A. The police had the street blocked off.

Q. Okay. Did they question you or talk to you at all?

A. Yes, sir. When I was going up the street, in order to get out of the neighborhood, they just asked me where I was going. I told them I was going to the nearby store. And they looked in the back of my car. And then they told me to continue.

Q. To continue -- were you on the phone with Mr. Whitfield at this time?

A. I had put the phone down but he was still on the phone.

Q. Okay. And after that occurred what happened?

A. I told him that the street was blocked off. And then [532] Miss Parnell said that she was having trouble breathing. Then --

Q. Miss Parnell told you that?

A. No, sir. I heard it in the background.

Q. You heard her say she was having trouble breathing?

A. Right.

Q. And what if anything did you hear Larry Whitfield say?

A. Mr. Whitfield asked her, did she have any aspirin or anything that she usually takes. And he asked her if he could get her a glass of water.

Q. Okay. And did you have any -- did you have any discussions with Mr. Whitfield about what was going on?

A. No, sir. I just told him to step into the hallway so that she could catch her breath.

Q. You told him to step into the hallway?

A. Yes, sir.

Q. And what if anything happened or conversation did you have after that?

A. After that it was like, just a brief pause, you know, while I told him to step into the hallway. And I was just reassuring him that everything would be okay.

Q. Were you -- did you tell him that you were still en route?

A. No, sir. At this time I told him that I was back at the store, which is a couple of minutes from the house.

[533] Q. Now, I want to direct your attention to two calls, ma'am, on this diagram; one at 3:59 p.m. you see that?

A. Yes, sir.

Q. And that lasted 16 -- looks like 16 minutes. Do you know where you were when that conversation was had?

A. I believe that's when I had gotten -- well, was on my way back to the gas station.

Q. Okay. Well, when you spoke to Miss Parnell in reference to this diagram, do you know or have any idea what time you might have spoke to her?

A. No, sir.

Q. Which one of these phone calls?

A. When I spoke with Miss Parnell, it was the longest conversation that I had had on the phone with Mr. Whitfield.

Q. Okay. Well, can I ask you to look at the last box, which is at 4:09 p.m.?

A. Yes, sir.

Q. You see that call lasted 16 minutes and 14 seconds?

A. Yes, sir.

Q. Is that timing of that call consistent with the time you spoke with Miss Parnell?

A. I believe I spoke with Miss Parnell before that call.

Q. Okay. Do you recall saying that you got to Gaston around 4:00?

A. Yes, sir. Yes, sir. Around that time. But I think it [534] was a little bit before.

Q. Okay. And about how long were you on the phone with him, after you talked to Miss Parnell, prior to hearing that she had trouble breathing?

A. I was on the phone with Mr. Whitfield for probably about ten minutes afterwards.

Q. Did you hear any yelling going on; was he yelling at her at all?

A. No, sir.

Q. Was there any screaming?

A. No, sir.

Q. Did you hear Miss Parnell yelling in the background?

A. No, sir.

Q. Did you actually hear her say that she was short of breath?

A. Yes, sir.

Q. Did you ever hear her say, I'm having a heart attack or anything like that?

A. No, sir.

Q. Now yesterday in the report prepared by -- now that report that you looked at, that statement was not written by you, right?

A. Right.

Q. Can you read and write?

A. Yes, sir.

[535] Q. Were you ever given an opportunity to write out your own statement?

A. No, sir.

Q. And do you recall seeing in there the term, that she was having a heart attack?

A. Yes, sir.

Q. Did Mr. Whitfield actually say those words to you?

A. No, sir. I just remember him saying that it didn't look like she was breathing, like she was unconscious.

Q. Well, I want to break it up a little bit.

A. Um-hmm.

Q. I want to first talk about following her saying she was sort of breath.

A. Right.

Q. Did Mr. Whitfield ever make a comment to you that she was having a heart attack?

A. No, sir.

Q. And then at what point in your conversation did he say it looked like she wasn't breathing?

A. This was after I told him to step into the hallway. And I spoke with him for a little bit. And I told him to check back on her.

Q. Okay. What did he report to you?

A. That's when he said it looked like he was unconscious.

Q. Did he tell you that he had done a physical examination [536] on her or anything?

A. No, sir.

Q. In fact, did he tell you that he was scared to go into the room?

A. Yes, sir.

Q. And so, did it seem to you that he did not physically go in the room to see whether she was breathing or not?

A. No, sir. He said he was scared to go into the room.

Q. Did he say, she's not breathing, or I think she may not be?

A. He said, I think she may not be.

Q. What if anything did you tell him?

A. Honestly, I don't recall. Because he was, you know, sad, like.

Q. He started crying?

A. Right.

Q. He was crying on the phone?

A. Yes, sir.

Q. And what -- what -- how did the conversation end?

A. He told me that someone was knocking on the door, and that he would call me back. And I didn't receive a call back.

Q. So did you hang up at that point?

A. Yes, sir.

* * * *

## APPENDIX I — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, DATED NOVEMBER 19, 2009

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:09-CR-9

UNITED STATES OF AMERICA

vs.

LARRY EMANUEL WHITFIELD

VOLUME IV of V

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE
ROBERT J. CONRAD, JR.
UNITED STATES CHIEF DISTRICT
COURT JUDGE
NOVEMBER 19, 2009

### EXCERPT OF WHALEN DIRECT

* * *

[748] Q. And Dr. Whalen, directing your attention to September, October of last year, do you recall conducting an autopsy on a woman named Mary Parnell?

A. Yes.

Q. I would like to ask you some questions about that autopsy.

I believe 32 is already in evidence. Is that your report from the autopsy, sir?

A. Yes, it is.

Q. If you lift the screen from the top front, it will come up.

It is in evidence, Dr. Whalen, so I would like to go through this report with you and your process when you performed the autopsy on Mrs. Parnell.

Why don't you tell us the sort of first basic thing that you did in her case.

A. Well, the external examination was uneventful. She had no evidence of any recent bruises, injuries, things of that [749] nature. No evidence of violence on the external examination.

Internal examination, the most significant finding was her heart. She had a very diseased heart. That's number one on our final pathologic diagnosis. Hypertensive and atherosclerotic cardiovascular disease.

Under that I listed the abnormalities that were found. One A, where it says cardiomegaly --

Q. Hold on a second, Dr. Whalen, while we zoom it so we can all -- okay. Dr. Whalen, you started to describe hypertensive and atherosclerotic disease that you viewed?

A. Yes.

Q. What is hypertensive?

A. Hypertension is elevated blood pressure, caused by a variety of things. Usually it's a result of some sort of heart disease. The blood is being pumped to your body under abnormally high pressure, which causes a variety of problems, kidney failure, heart failure, that sort of thing.

Q. How old was Mrs. Parnell?

A. I believe she was 79 years old. Yes, she was 79.

Q. And in your experience, dealing with patients who might have died from some other cause when you also looked at their heart, is this a common condition in people of that age?

A. It is a common condition in the bodies that I have examined in that age.

* * * *

## APPENDIX J — EXCERPTS OF JURY INSTRUCTIONS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, DATED NOVEMBER 20, 2009

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:09-CR-9

UNITED STATES OF AMERICA

vs.

LARRY EMANUEL WHITFIELD

VOLUME V OF V

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE
ROBERT J. CONRAD, JR.
UNITED STATES CHIEF
DISTRICT COURT JUDGE
NOVEMBER 20, 2009

* * *

[1019] [Court] I will now address Count Four in which the defendant is charged with violating 18, United States Code, Section 2113(e) in two different ways.

One involves the alleged killing of Mary Parnell.

And the other involves the alleged forced accompaniment of her by the defendant.

Now the count reads as follows:

On or about September 26, 2008, in Gaston County, within the Western District of North Carolina, defendant Larry Whitfield, did knowingly enter and attempt to enter Fort Financial Credit Union, 1475 North New Hope Road, Gastonia, North Carolina, a credit union whose deposits were then insured by the National Credit Union Administration Board, with the intent to commit therein a felony affecting that credit union.

In violation of 18, United States Code, Section 1321(a) a statute of the United States, as set forth in the Count One of the indictment.

And in avoiding or attempting to avoid apprehension for said offense, forced M.P. to accompany him without her consent and killed M.P.

[1020] In violation of Title 18, United States Code, Section 2113(e).

That statute makes it unlawful for whoever in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such an offense, kills any person, or forces any person to accompany him without the consent of such person.

*Appendix J*

For you to find the defendant guilty of this offense, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

That on or about the date alleged in the indictment in Gaston County, North Carolina:

One, the defendant committed the offense alleged in Count One; that is attempted robbery of a credit union.

Two, in avoiding or attempting to avoid apprehension for that offense, the defendant."

A, killed Mary Parnell.

Or B, knowingly forced Mary Parnell to accompany him without her consent.

As I told you previously, the defendant is charged with violating this statute in two ways.

Thus, you must consider both whether the defendant killed Mary Parnell and/or whether he forced her to [1021] accompany him in avoiding or attempting to avoid apprehension for the attempted robbery of the credit union.

With respect to the second way of violating this statute, if you find that the defendant forced Mary Parnell to accompany him, you must also decide whether that forced accompaniment resulted in Mary Parnell's death.

*Appendix J*

You should mark your decision on this question if appropriate on the verdict form.

If you find beyond a reasonable doubt that the defendant either killed Mary Parnell, or forced her to accompany him or both, you may find the defendant guilty of this offense. If you also find beyond a reasonable doubt the other elements are satisfied.

I remind you that your verdict must be unanimous as to each element of the offense and which way, if any, the defendant violated the statute.

You will be given a verdict form to record your decision.

To force another person to do something without her consent, is to compel the person to act against her will through the use of intimidation or threats of harm.

The term "forced accompaniment" includes, forcing a person to move from one part of a building to another against her will. It does not require that the government show that the defendant crossed a property line, moved a [1022] person a particular number of feet, held the person for a particular period of time, or placed the person at a certain level of danger.

I've previously defined the term intimidation and knowingly, and you are to apply those instructions to this count.

*Appendix J*

The following instructions apply to the term "killed" and the phrase "resulted in death".

The government is not required to prove that the defendant intended to kill Mary Parnell. Rather, the government must prove that the defendant's actions in avoiding or attempting to avoid apprehension, were the proximate cause of her death.

Proximate cause exists when the conduct in question plays a substantial part in bringing about or actually causing the death of another person.

That is, the death would not have occurred, when it did, without the conduct. And the conduct made the death more likely.

However, the conduct need not be the only cause of death. This is true even if the person would not have died as a result of the conduct if the person did not have a preexisting condition that made the person more vulnerable.

Thus, the presence of a preexisting medical condition, would not necessarily preclude a finding of [1023] proximate cause.

The question is, whether the defendant's conduct accelerated the death, or caused the death to occur when it did.

* * * *

## APPENDIX K — VERDICT FORM OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED NOVEMBER 20, 2009

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:09cr9

UNITED STATES OF AMERICA

vs.

LARRY WHITFIELD (1)

**VERDICT FORM**

1. As to Count One, charging the defendant with a violation of 18 U.S.C. §§ 2113(a) and 2, in relation to the Fort Financial Credit Union in Gastonia, North Carolina, we, the jury, unanimously find the defendant:

Guilty: ☒ Not Guilty: ☐

2. As to Count Two, charging the defendant with a violation of 18 U.S.C. § 924(o), we, the jury, unanimously find the defendant:

Guilty: ☒ Not Guilty: ☐

3. As to Count Three, charging the defendant with a violation of 18 U.S.C. §§ 924(c) and 2, we the jury, unanimously find the defendant:

Guilty: ☒ Not Guilty: ☐

4. As to Count Four,

(answer parts a. and b. below, and, if appropriate, c.)

a. charging the defendant with killing Mary Parnell in avoiding or attempting to avoid apprehension for the offense alleged in Count One, in violation of 18 U.S.C. § 2113(e), we, the jury, unanimously find the defendant:

Guilty: ☐ Not Guilty: ☒

b. charging the defendant with forcing Mary Parnell to accompany him in avoiding or attempting to avoid apprehension for the offense alleged in Count One, in violation of 18 U.S.C. § 2113(e), we, the jury, unanimously find the defendant:

Guilty: ☒ Not Guilty: ☐

c. If your answer to 4(b) above is "yes," did the forced accompaniment result in Mary Parnell's death?

Yes: ☒ No: ☐

*Appendix K*

Signed: /s/_____
FOREPERSON

Dated: 11/20/09

## APPENDIX L — EXCERPT OF TRANSCRIPT OF RESENTENCING HEARING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED OCTOBER 31, 2012

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:09-cr-9

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

LARRY WHITFIELD,

*Defendant.*

TRANSCRIPT OF RESENTENCING HEARING
BEFORE THE HONORABLE
ROBERT J. CONRAD, JR.
UNITED STATES CHIEF DISTRICT
COURT JUDGE
OCTOBER 31, 2012

* * *

[34] Mr. Whitfield, if you would please stand.

*Appendix L*

I have consulted the advisory guidelines, presided over the trial of this case, the evidence in the trial will never be forgotten by this Court, the tragic death of Mrs. Parnell is something that one doesn't forget.

I am considering the factors noted in 18, United States Code, Section 3553(a), in light of the remand from the Fourth Circuit, and must pick a sentence that is sufficient but not greater than necessary to accomplish those factors.

I do believe that this was egregious conduct. I think that the phrasing by the assistant U.S. Attorney that this conduct was intentional in the sense that Mr. Whitfield let Mrs. Parnell die. And that the conduct leading up to it showed a premeditated, selfish, course of conduct that recklessly disregarded the life of another human being for purposes of attempting to flee after having robbed a bank.

[35] It was a serious attempt, both co-conspirators were armed with semi-automatic weapons, had calculated, planned to escape involving multiple vehicles, a high speed flight, and the breaking into different homes by Mr. Whitfield, wielding a knife when one homeowner came home, and scaring to death Mrs. Parnell.

There were opportunities ignored by the defendant in the course of his time with Mrs. Parnell, including in conversation with an acquaintance, and a recommendation to call an ambulance which was ignored. And then the ignoring of the first responder at the door.

All of this shows a callous disregard for life, the need for the Court's sentence to protect the public from further crimes of the defendant, to be a just sentence that promotes respect for the law, deters other criminal conduct as well as to accomplish the other purposes of sentence.

On the other hand, the offense level 43, which is the advisory guideline offense level found by the Court to be applicable in triggering a life sentence, is a sentence that is applicable to, among other things, first degree murder conduct, and in some respects may overstate the likelihood that the defendant will engage in future criminal conduct.

The Court is informed by the guidelines which do recommend consideration of a departure from the first degree murder guideline range, and indicates certain factors to be [36] considered by the Court, including the defendant's state of mind, the degree of risk inherent in the conduct, and the nature of the underlying offense conduct.

The Court has -- believes that the defendant's state of mind involved a reckless disregard for the lives of others, reflected by his criminal conduct on that day. There's a high degree of risk inherent in his conduct, including the armed attempt to rob a bank, the knife wielding episode in Ms. Walden's house, and then the callous disregard for the life of Ms. Parnell.

The Court will take all of that into consideration, and pursuant to the Sentencing Reform Act of 1984, it

is the judgment of the Court that the defendant Larry Whitfield is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 264 months on Count Four, to be run concurrently with the previously imposed sentences on Counts One and Two, and consecutive to the 60 month sentence previously imposed on Count Three.

A sentence of 264 months is sufficient but not greater than necessary to accomplish the sentencing purposes of Section 3553(a) just discussed; is within the range established by a departure to offense level 38, criminal history category I; and takes into account the state of mind of the defendant, the risk inherent in his conduct, and the very egregious nature of his underlying offense. The Court [37] does not believe it was careless conduct, but a callous and reckless disregard for the life of another person.

The Court also took into consideration the fact that the defendant does not have a prior criminal conviction, but that the conduct at issue was especially callous and proximately caused the death of Mrs. Parnell.

The sentence imposed by the Court would be the same regardless of how the advisory guidelines were applied. The Court believes that the appropriate application of the guidelines was through the 2B3.1(c) cross-reference to 2A1.1, and a departure from 2A1.1 for the reasons stated by the Court.

Had the Court decided the procedural question of the applicable guidelines differently, it would have still imposed the same sentence to accomplish a sufficient but

not greater than necessary sentence, the purposes of Section 3553(a).

The Court undertook this sentence with the belief that the remand before the Court was for the purpose of resentencing on Count Four. But had the Court believed it had authority to resentence on other counts, it would have imposed the same sentence that it is imposing today, under the understanding that it has remand authority to resentence solely for Count Four.

In other words, if I believe that I had the authority to sentence anew on Counts One, Two and Four, even [38] if I had the authority to do that, I would have imposed the same sentence that I am imposing today, with the more limited understanding of my resentencing authority.

All other conditions of the original sentence are reimposed for the reasons stated at the previous sentencing hearing.

Other than what we've already discussed and noting the objection counsel has to -- with respect to the guidelines, are there any other reasons that the Court should consider before imposing the sentence as stated?

MR. O'MALLEY: No, Your Honor.

MR. TATE: No, Your Honor.

THE COURT: Then let the sentence be imposed.

* * * *

## APPENDIX M — GOVERNMENT EXHIBIT 38

Statement of Larry E. Whitfield
2-11-88
1570 Hollow Maple Dr.
Charlotte, NC 28216

Written by W. M. Sampson

Earlier today me and Quan wrecked on I85. We were running from the police. We split up and I ran into a neighborhood. I hid in some woods for a while. I started hearing sirens so I decided to look for a house to hide in. I saw a two story house it had a shed next to it. There was a dog inside the house. I knocked on the door and no one came to the door. I stayed near the garage hiding the police were getting close. The dog was still barking in the house. After no one came to the door I decided to kick in the door it took about four kicks to get in. I changed my pants and shirt in the house. I found the clothes in a bedroom up stairs. About forty-five minutes later a white woman came home. She saw me so I ran out she ran also. I grabbed a knife from the kitchen. I had the knife in my hand when she came through the door. I ran out of the house and hid in the woods. I was running looking for a another place to hide. I saw the back door open to a house. There is a porch to the house. There was patio furniture on it. I walked straight into the house. I saw a table and chair in front of me and the kitchen was to the left. I walked into the house and started looking through the windows looking for the police. While I was walking down the hallway I saw a room to my right. There was an old woman sitting in a chair she looked like she was asleep. She had her head slumped forward. She was facing the door to

the room or pretty close to facing the door. It startled me so I backed up. I listened for a little bit to see if she would wake up. After that I went to the kitchen then went back and checked her and she was still asleep. I tiptoed down the hallway and went into the other bedrooms looking out the windows. I think I was inside her house for about 20 to 30 minutes. I walked into the computer room twice. The woman never moved while I was in the computer room. I could hear her moving while I was in the kitchen. I turned on the television in the living room and watched it for a few minutes. I then heard someone at the front door. I thought someone was going to come into the house. I could hear a police radio through the door. I was sitting on the couch. While the knocking at the door I decided to leave out the back door. The phone kept ringing I thought someone was checking on the old woman or might have seen me. I used the phone in the house to call my friends for help. I called 704-222-1019 they answered I told them I needed someone to come pick me up. I used the cordless and corded phone. I closed the back door partially when I left. I tried to run to the highway when I was arrested.

/s/_____
Larry Whitfield III

## APPENDIX N — GOVERNMENT EXHIBIT 39

Statement of Larry E. Whitfield 9-26-08
2-11-88 8:53 pm

Written by W. M. Sampson

During the first conversation with Detective Sampson and Sumner I made a mistake. I said I went in the back door to the old woman's house. I really went through the front. As soon as I walked through the house I saw a older white woman coming toward me from the hallway. I don't know for sure if she came out of the computer room. I told her I am not here to hurt you. I told her I just needed a place to hide. I told her I am not here to hurt her. I asked her to go into the computer room. I asked where could we go in the house where the police couldn't see us. She sat down in a chair. I went and got a telephone and made some phone calls. She asked me several times what do you want me to do. She said my husband is on his way home. I told her I would be gone soon. I walked back into the computer room and she was sleeping. I could hear her breathing but her breathing was not normal. I left the house around 10 minutes later. Sometime around 5 minutes into me being in the house she asked me to leave and said her husband was on the way home.

/s/_____
Larry Whitfield III

9:07 pm

## APPENDIX O — EXCERPT OF INTERROGATION, MARKED GOVERNMENT EXHIBIT 41(a)

[23] WHITFIELD: Yes. No. I didn't, it wasn't closed, I just, 'cause like I said they was coming to the door so I pulled it, but I didn't, it wasn't closed but it pulled down, ti was pulled. Like if you probably just want like that, you probably wouldn't know I went through the back door. But if you gone to the kitchen, you'd see that the door was cracked, so...

SUMNER: Yeah, but I'm saying, I'm saying when you first went in, you pulled the door closed behind you. Is that correct or did you leave it cracked?

WHITFIELD: When I first went in?

SUMNER: Yeah, when you first went in.

WHITFIELD: (UI) first went in (UI).

SUMNER: It would make sense to me that you would close the door, 'cause you're on the run.

WHITFIELD: Yeah.

SUMNER: And you don't want them thinking ....

WHITFIELD: I, I'm pretty sure I closed it. I'm pretty sure.

SUMNER: It's not that important, I'm just trying to (UI) that's my, I'm real anal, sorry.

*Appendix O*

WHITFIELD: I remember a majority of what I did. I can't detail, you know, I'm probably gonna mess up a little.

SUMNER: Yeah. I, I, I, I understand. Under the circumstances, I understand.

SAMPSON: Which way was she facing when you first saw her LARRY?

WHITFIELD: Like how I'm facing ya'll, but if this was the door, like if ya'll was, she was facing the door. She was facing the door.

SAMPSON: To the room?

WHITFIELD: Well really it was kind of slanted. It was like probably like this but the doors, where you are at and kind of like a little bit towards him but it's kinf of like...

SAMPSON: We'll say pretty close.

WHITFIELD: Like, it's like in the middle of the, (UI) slant a slight slant.

SAMPSON: And you said you listened for a little bit to see if she woke up?

WHITFIELD: Yes.

SUMNER: Did you ever say hey lady or anything like that?

WHITFIELD: No.

SUMNER: Did you tap her on her shoulder?

WHITFIELD: No.

SAMPSON: So, so how long did you wait there to see if she woke up, you know right there in the hallway?

WHITFIELD: (UI) like I said when I went, I backed up and went to the kitchen.

SAMPSON: Um hm.

WHITFIELD: Then I came back (UI) and peeked around the corner to see if, like I waited to see if I was going to hear some ovement, so then I peeked around the corner to see if she was awake. But she wasn't. Went straight into the other room. The room towards the front, so I could see the front. So I could see the, um, the street, the main street.

SAMPSON: And you would say you was in there for how long?

WHITFIELD: Twenty to thirty minutes.

SUMNER: Did you ever look at the clock when you were in there?

WHITFIELD: Uh, when I was watching the news it was, it was, what time is it now, I don't even remember. I can estimate though 'cause I was ...

*Appendix O*

SUMNER: Did you remember seeing a digital clock?

WHITFIELD: Yeah, they (UI).

SUMNER: 'Cause sometimes that flashes in my memory a lot.

[24]WHITFIELD: I, I, it was clocks in there, but that was a least bit of my worries.

SAMPSON: Um.

WHITFIELD: But I remember looking at the t.v. and seeing, it's two, it was like two o'clock, but I can't remember. No, it might have been later than that. No, what time is it now?

SAMPSON: Eight-twenty.

WHITFIELD: ight twenty. (UI)

SAMPSON: Let me ask you LARRY, how many times would you say you walked into the computer room?

WHITFIELD: I walked in once to go, twice...

SAMPSON: Twice?

WHITFIELD: Twice I went in and that was it.

SAMPSON: And you said she never moved at all?

*Appendix O*

WHITFIELD: Like I said when she was moving she was (UI) and I could hear her and I figuring I'm not knowing whether she's waking up.

SAMPSON: Un hun.

WHITFIELD: Or if she's just breathing hard.

SAMPSON: Un hun.

WHITFIELD: (UI) go back.

SAMPSON: Did, did that freak you out saying oh man, she's, she's really moving?

WHITFIELD: Nah, 'cause I figured she was an old lady so, if it was a dude....

SAMPSON: Un hun.

WHITFIELD: If it was a man or something I would have been, that would have freaked me out.

SAMPSON: So she never moved while you were in the room?

WHITFIELD: Un un.

SAMPSON: But you could hear her moving when you were in the kitchen?

WHITFIELD: Yeah. Like different sounds. Not as in moving of a, getting out of the chair or anything like that. Maybe it was switching position or like the, or just the breathing like I said. Switch position or breathing. And, but a long, she kept, I mean her phone kept ringing so, and after the phone stopped ringing, no one picking up, somebody knocked at the door, keep knocking out there then they stopped. I hear somebody talking on the walkie talkie, so I get up off the couch and look through the peep hole, but he wasn't at the peephole, he was like, you couldn't see him. If I really wanted to see him I prob-, he probably seen me. So, I say I'm going to go through the back door. Okay, so I looked through the back door to see if anybody was back thee, (UI) so it was really a chance that I'd rather see, see them later back there then him being at the front door you know. (UI) 'cause I didn't want him to hear, I didn't know how close he was to the door. So I twisted it. You know what I'm saying, just in case somebody was out there that would help me, open the door, I waited, 'cause if he wasn't coming in I didn't have to leave. So, I waited, waited and then I started haring, I mean he probably wasn't even coming in, but I was so scared I, p-, I'm thinking he was coming. I'm thinking he was about to come in, 'cause he was just messing with the door knob. But he was messing with the door knob, and I figured that somebody was coming in. So I left, don't close the door, just enough if they came in they wouldn't be like through the back door. Close it just enough and ran through the watchacallit, the woods. Somebody, a cop to my, uh, when did I see that cop? I was through the woods. I don't know, he seen me, he said stop. I [25] kept running. Running through the woods. (UI) running through the

water, uh, through the water, it's like pine, like sharp little pines and stuff, laid down on those, thinking that I about to just give it up. But I know I can't get out now, 'cause they surrounded the area. One of the cops said he's around here somewhere, he's in this area here. So they started setting up and I just like, I'm just about to give myself up, 'cause I was just waiting. 'Cause I'm not going to move. If they catch me, they catch me. He came, I seen, I seen the dude looking, uh, one of the officer's looking at me, but I didn't move. And he said, and he was like trying to study, like is that a, is that somebody in there, uh, put your hands up, this and that, this and that, and tell me, telling me (UI) one of the cops asked if I was resisting arrest. He gonna say, yeah. I said no I'm not. I went like the, got guns why would ri-, yeah I didn't have no gun. Everybody....

SAMPSON: Yeah.

WHITFIELD: Aiming guns at me.

SAMPSON: Yeah.

WHITFIELD: He talking about, he's resisting arrest, he's resisting-, and he said yeah, he's resisting arrest. I was like no I'm not and then they started bring the dog, probably, I don't know, it seemed like they were about to let the dog bite me. And I really thought I was going to lose my life.

SAMPSON: Um.

WHITFIELD: You know.

*Appendix O*

SAMPSON: But you're good to go right?

WHITFIELD: What you mean?

SAMPSON: I mean you're, you're okay.

WHITFIELD: Oh yeah, they didn't...

SAMPSON: Okay. Let me ask you this...

WHITFIELD: All they did was arrest me.

SAMPSON: You could hear the police radio through the door right?

WHITFIELD: Yes.

SAMPSON: Okay.

WHITFIELD: But I couldn't really hear...

SAMPSON: And you heard them....

WHITFIELD: I heard him, I heard him talking.

SAMPSON: What part of the house were you in when you heard the police radio?

WHITFIELD: Sitting on the couch.

SAMPSON: Sitting on the couch?

WHITFIELD: Yeah.

SAMPSON: You were nowhere else in the house?

WHITFIELD: Not when I heard the police radio. 'Cause I nee to know, 'cause I was needing to know if I had to run through the back, you know...

SAMPSON: And how long after that did you decide to running out the door?

WHITFIELD: When he knocked when he finally came...

SAMPSON: Un hun.

WHITFIELD: I mean it probably was, after, once, the knocking started all I could figure out is somebody called checking on their grandma or wife or whatever. She was an old lady. Checking on her. She's not picking up the phone, they probably thinking, always home...

SAMPSON: (UI)

WHITFIELD: Yes. Probably thinking that she was always home. Why she not picking up the phone. (UI) wanted to check on her. And I was like dang, they might be a family member, so I don't, I might not have to run. But that might be a cop. Somebody could [26] have called the police. Like one of the family members could have called the police. Sent them to the, so I'm like man please...

SAMPSON: Did you ever touch the phone?

WHITFIELD: Yes.

SAMPSON: You did?

WHITFIELD: Yes.

SAMPSON: Where was it at when you first touched it?

WHITFIELD: Uh, right by the door, right by the, um, what you call it, the back door.

SAMPSON: Um hm.

WHITFIELD: And then when you walk...

SAMPSON: Wh-, wh- where was it sitting and what was it sitting on?

WHITFIELD: It's like a holster, like a phone (UI) thing.

SAMPSON: Un hun.

WHITFIELD: Like a regular phone that you got, got the cords with it. That's at the back door. Then I knew I couldn't stand right there 'cause if I stood right there, um, the windows right there. So, standing by the phone, I'm right by the back window. So I walk, walk to, uh, through the, through the house and there's a cordless phone right there. There's two bedrooms right there, before you get to that last two bedrooms, the cordless phone's right there. So I take the phone.

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SUMNER: What was, what was the purpose of taking the phone. I'm not, I'm not following you on that?

WHITFIELD: I needed to know what was going on. Try to, try to get a, a ride.

SUMNER: To call somebody?

WHITFIELD: Yeah.

SUMNER: Uh did you?

WHITFIELD: Get a ride to leave, but I couldn't. It was, it wasn't working.

SUMNER: Who'd you call?

WHITFIELD: Uh, my friends, like, uh, five of 'em.

SUMNER: You called a bunch of people?

WHITFIELD: Hm. I'd say, not a lot, two or three.

SUMNER: Two to three people?

WHITFIELD: Yeah.

SAMPSON: Which phone did you use?

WHITFIELD: Both.

SAMPSON: The corded or cordless?

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WHITFIELD: Both, both.

SAMPSON: Both.

SUMNER: Well, what phone numbers did you call because obviously it's, it's part of the record. So you might as well go ahead and let us know just so that we know who it is that you called and they didn't come and get you. They didn't assist you in any way, did they?

WHITFIELD: No.

SUMNER: Okay. So don't you worry about that. So what numbers did you call?

WHITFIELD: 704...

SAMPSON: Okay.

WHITFIELD: 222...

SAMPSON: Un hun.

WHITFIELD: 1019.

SAMPSON: Did they answer?

WHITFIELD: Yeah, it was them. It was, I didn't tell them, you know, I, they were gonna come get me, they didn't, I didn't, they [27] don't, they didn't know what was going on. (UI) see what I'm saying.

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SAMPSON: And you told him you just needed somebody to pick you up?

WHITFIELD: Yeah. That I'm in trouble. I needed somebody to come pick me up.

SAMPSON: Where you at in the house when these conversations are going on LARRY?

WHITFIELD: Everywhere, walking around, walking mostly towards the kitchen though and in the back room. Mostly toward the kitchen (UI).

SAMPSON: So back and forth.

WHITFIELD: Back, back and forth.

SAMPSON: So you're back and forth from the kitchen to the back room?

WHITFIELD: Yeah. But not talking loud. From kitchen far away from the room or to the bac, back room. But I had to stay away from the windows too.

SAMPSON: Un hun.

WHITFIELD: You know.

SUMNER: Any other numbers that you called?

WHITFIELD: Hun?

SUMNER: Any other numbers that you called? You just called that one number. One hundred percent LARRY?

WHITFIELD: Yes.

SUMNER: Come on now.

WHITFIELD: No, I swear, I swear.

SUMNER: Seriously?

WHITFIELD: I swear. Ya'll got the records anyway, so.

SUMNER: Yeah, that's what I'm saying, there's no need to, I mean it's not a matter of getting somebody else in trouble, that's not what we're here to do. But I just, again, I'm a very, uh, very detailed....

WHITFIELD: Un hun.

SUMNER: I just want to make sure it matches up with what you're saying.

WHITFIELD: Yes. Lets good with that.

SUMNER: Because if it doesn't then we're gonna go, well why doesn't it. What he g-, what's he leaving out? You know, then my Sergeant's gonna make me go look and dig and go over somebody's house and, you know, I don't want to do all that.

SAMPSON: Alright LARRY, lets (UI) this and make sure we, uh...

WHITFIELD: Is that friend gonna get in trouble?

SAMPSON: No. No.

WHITFIELD: (UI).

SAMPSON: That's a moot point here, uh, LARRY.

WHITFIELD: See what I'm saying.

SAMPSON: What did they do wrong? You called them.

WHITFIELD: Yeah.

SAMPSON: So don't worry about it. Alright, listen to this with me...

WHITFIELD: Yes.

SAMPSON: Alright, read along right here with me. Hold this pen. I want you to make some initials for me.

WHITFIELD: Okay.

SAMPSON: Uh, as we go along. See that line right there?

WHITFIELD: Yes.

SAMPSON: Can you put your initials right there for me?

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Alright (UI) wrong one LARRY. Put you're initials right there alright. It says, earlier today me and QUAN wrecked on I-85. We were running from the police. We split up and I ran into the [28] neighborhood. I hid in some woods for a while. I started hearing sirens so I decided to look for a house to hide in. I saw a two story house and it had a shed next to it. There was a dog inside the house. I knocked on the door. No one came to the door. I stayed near the garage hiding. But the police were getting close. The dog was still barking in the house. After no one came to the door, I decided to kick in the door. It took about 4 kicks to get in. I changed my pants and shirt in the house. I found the clothes in a bedroom upstairs. About 45 minutes later, put your initials right beside that little correction I made. it says a lady-, about 45 minutes later a white woman came home. She saw me so I ran out. She ran also. I grabbed a knife from the kitchen. I had the knife in my hand when she came through the door. I ran out of the house and hid in the woods. I was running, looking for another place to, to hide. I saw a back door open to a house. There's a porch to the house. There was a patio furn-, there was patio furniture on it. I walked straight to the house. I saw a table and chairs (UI). The kitchen was to my left. I walked into the house and started looking through the windows, looking for the police. Put your initials right there (UI).

SERGEANT REYNOLDS: Yeah.

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SAMPSON: Uh, lets see, lets see, while I was walking down the hallway, I saw a room to my right. There was an old woman sitting in the chair. She looked like she was asleep. She had her, she had her head slumped forward. She was facing the door to the room. Or, pretty close to the door. I tstartled me so I went backed up. I listened for a little bit to see if she would wake up. After that, I went back to the kitchen and went back and checked, checked her and she was still asleep. I tip toed down and went to the other bedrooms looking out the windows. I think I was inside her house for about twenty or thirty minutes. I walked to the computer room twice.

SERGEANT REYNOLDS: (UI).

SAMPSON: The woman never, never moved while I was in the computer room. I could hear her moving a while, moving while I was in the kitchen. I turned on the television, (UI) right there. (UI) put you initials right there where I added that there. So I turned on the TV in the living room and watched it for a few minutes. I then heard someone at the front door. I thought someone was going to come into the house. I could hear a police radio through the door. I was sitting on the couch. While they're knocking at the door, I decided to leave out the back door. The phone kept ringing, I thought someone was checking in on the old woman, or might have seen me. (UI) pen. Put your initials right there LARRY. So then I used the phone in the house to call a friend's for help. I called 704-222-1019. The answered and I told them I needed someone to come pick me up. I sued the cordless and the corded phone. I closed the back door partially when I left. I tried to run to the highway when I was arrested. Does that sound good?

WHITFIELD: Yes sir.

SAMPSON: Now, put your initials on both of those lines and sign that for me LARRY and sign it on the line right there.

WHITFIELD: Sign.....

SAMPSON: Put your initials here and here.

SERGEANT REYNOLDS: LARRY.

SAMPSON: Yeah.

SERGEANT REYNOLDS: While you're signing that...

SUMNER: (UI) little x right there.

[29] SAMPSON: Sign it on that line too for me LARRY.

WHITFIELD: (UI).

SUMNER: Yeah. It doesn't matter.

SAMPSON: It doesn't matter.

SERGEANT REYNOLDS: LARRY, as you sign that I just want to tell you I appreciate you cooperating in this investigation. Uh, they're gonna ask you a cou-, more questions, but, h, one thing I want to, uh, reiterate just a second, you, did you ever con-, I know you said the lady was sleeping, but she had to have said something to you

or you had to have said something to her. Because you're just not going to be in her house and not recognize it. You know, what I'm saying.

WHITFIELD: No.

SERGEANT REYNOLDS: 'Cause if I pass you I'm gonna say, just don't say nothing or you know if I'm in sombody's house. I just want to clear that little part up.

WHITFIELD: No. She didn't have to say something.

SERGEANT REYNOLDS: Did she, did she know your was in there?

WHITFIELD: Like I said she, she...

SERGEANT REYNOLDS: She could have been playing opossum.

WHITFIELD: Yeah, but I said she, uh...

SERGEANT REYNOLDS: But you could hear her breathing?

WHITFIELD: Yeah, I could hear...

SERGEANT REYNOLDS: And you didn't say nothing to her as you was running up and down the hall.

WHITFIELD: I wasn't running.

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SERGEANT REYNOLDS: As you was walking.

WHITFIELD: Yes.

SERGEANT REYNOLDS: You didn't, you didn't say nothing to her?

WHITFIELD: No.

SERGEANT REYNOLDS: Did she say anything to you?

WHITFIELD: No.

SERGEANT REYNOLDS: Okay. Alright.

SAMPSON: Put your initials right there LARRY.

SERGEANT REYNOLDS: I'll let you all get back (UI).

SUMNER: Wait, wait, wait a minute, let's, let's, let's, uh...

SERGEANT REYNOLDS: (UI) you want some crackers?

WHITFIELD: Uh, yes please.

SERGEANT REYNOLDS: Okay. I appreciate it LARRY.

SUMNER: He. (UI) got all the houses right.

SAMPSON: Hey LARRY. Got you a snack man.

WHITFIELD: (UI).

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SAMPSON: Go ahead and grab you a bit to eat, okay.

SUMNER: Does he pass out (UI) or what man?

SAMPSON: l dont' know man. I couldn't tell you. I didn't take my lunch (UI) figure, uh....

SUMNER: Freaking starve (UI) over here. (UI) out in the woods with LARRY (UI). No I'm just kidding (UI). Let's, um, let's back up, we got to, we got to get this squared away, and settle once and for all okay. Um, entyr into the house, you've been, you've been on the money with the first house, the clothes, uh, the, the, the white lady, you know, that you startled, both of you startled each other. You had a knife and you weren't weilding it. On the money with all that. On the money with the time that you were running. On the money that you were, you know, running in the woods. On the money, you know, with, uh, inside the second lady's. But what's not, what I don't understand is how you got in.

WHITFIELD: She didn't let me in. I walked. The door was already open. (UI).

SUMNER: See and the reason....

[30]WHITFIELD: That's the only (UI) the house.

SUMNER: The reason, the reason but, but I'm thinking that you know, that you heard the dogs. You know they were getting closer.

WHITFIELD: No. No. (UI).

SUMNER: You had to, you had to make way in. And I'm wondering, um, if she didn't, 'cause that door's always locked.

WHITFIELD: She didn't.

SUMNER: Always, always, always locked.

WHITFIELD: She didn't let me in. I swear she didn't let me in.

SUMNER: I mean that door, I mean that door hadn't been opened in a long, ling time.

WHITFIELD: What door?

SUMNER: That back door.

WHITFIELD: It hadn't been open?

SAMPSON: Spider webs, there's still spider webs on it. So it never gets used.

SUMNER: (UI) some crackers. What you normally drink, diet coke?

WHITFIELD: I drink whatever.

SUMNER: Oh okay. You're looking at that like it's nasty or something, like it's a (UI). So everything's, everything's on the money but the, but the back door.

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SAMPSON: Tell, tell us LARRY exactly what happened LARRY when you went in the house, okay. Just be honest.

WHITFIELD: Alright.

SAMPSON: What all happened?

WHITFIELD: This is what happened.

SAMPSON: Alright.

WHITFIELD: When I told you all the story the first time.

SAMPSON: Un hun.

WHITFIELD: I said I went through the front, but then you asked me something again and I accidently said I went through the back. So I just kept it. 'Cause I didnt' want to make it seem like I was lying. You know what I'm saying?

SAMPSON: Good. Good.

WHITFIELD: Like when I said I went through the front. When you asked me about the porch. And you was like, but then you had switched it (UI) out the back.

SUMNER: You were leading off of him weren't you?

WHITFIELD: Yeah. And it kind of, it kind of messed me up.

SAMPSON: Un hun.

WHITFIELD: So I just kept it. I didn't want to switch my story 'cause then it sounded like I was telling a lie.

SAMPSON: But you're being honest now?

WHITFIELD: Yeah.

SAMPSON: That goes a long way.

WHITFIELD: Yeah.

SAMPSON: That goes a long way to making you look credible.

WHITFIELD: So I just, but I swear she didn't let me in. I went through the front, I seen her, as I'm running, I was gonna run through the yard but her, her door was open. So, I went through the front. And I swear on everything that her door was open. She never let me in.

SAMPSON: Hm.

WHITFIELD: I went through the back, but and she was awake, you know, she was awake and I told her I didn't uh, I'm not here to hurt you.

SAMPSON: Hm.

WHITFIELD: And I just needed somewhere to stay.

SAMPSON: Un hun.

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[31] WHITFIELD: And she was cooperative with it.

SAMPSON: Hm.

WHITFIELD: And then she went in the computer room.

SAMPSON: Un hun.

WHITFIELD: And I was talking on the phone.

SAMPSON: Okay.

WHITFIELD: That what happened, okay.

SAMPSON: Good. I'm glad you cleared that up LARRY. I am.

WHITFIELD: I accidentally, when you, I had switched it up, when you said...

SAMPSON: (UI).

WHITFIELD: And I didn't, I didn't want to lie. I just kept going with the flow, you know, 'cause I just kept going with it. But then I was like I know I should tell, you know, what I'm saying.

SAMPSON: Hm.

WHITFIELD: That...

SAMPSON: Well we appreciate that.

WHITFIELD: 'cause it wasn't that serious. (UI) either back door or front door, but I just...

SAMPSON: (UI) details just get all twisted.

SUMNER: Yeah, that's, that's what, that's what's been tearing me up the whole time. It's been eaten, you see me try to, looking at you like this...

WHITFIELD: Yeah.

SUMNER: You saw me. You looked at me.

WHITFIELD: Yeah.

SUMNER: (UI).

WHITFIELD: (UI) can say, but I was like, I can't because I had already said that I had went through the back door. So I have to stay with the back door. But like you said (UI).

SAMPSON: Something, clear this up. When you went through the front door where was she at in the house?

WHITFIELD: When I came in she was coming from the computer-, well I can't say computer room, but she was coming from...

SAMPSON: She was coming from the hallway.

WHITFIELD: Yeha, we met, as soon as I came in I guess she heard the door.

SAMPSON: Un hun.

WHITFIELD: So as soon as she, I mean, she didn't, I know she didn't think, you know what I'm saying. 'Cause I seen it in her face.

SAMPSON: Um...

WHITFIELD: Then I was like ma'am, I'm not here to hurt, I don't have no weapons and I'm not here to hurt you. I just need somewhere to stay.

SAMPSON: Un hun.

WHITFIELD: You know. I said I seen your door open.

SAMPSON: Un hun.

WHITFIELD: I'm, I'm sorry, she was like well okay. I mean what do you want me to do, this and that. And I was just like you don't have to do nothing. I just want, I just need somewhere to, to sit.

SAMPSON: Un hun.

WHITFIELD: That's it.

SAMPSON: Un hun.

WHITFIELD: I not even gonna touch, like you know I didn't even touch her. I didn't.

SUMNER: Did you, did you, did you guide her to the, um, to the, um, the office?

WHITFIELD: Yes.

SUMNER: You, you okay...

[32] WHITFIELD: Like I didn't, no. I didn't....

SUMNER: (UI) sitting in the office.

SAMPSON: (UI).

WHITFIELD: I just know, she, she was in front of me and she went into the computer room. I don't remember to-, I really don't remember touching her. Like come on ma'am.

SAMPSON: Un hun.

WHITFIELD: But she was co-, but like, you know what I'm saying, I was cooperative with her and she was cooperative with me. I didn't put my hands on her.

SAMPSON: Hm.

WHITFIELD: Or use no weapons or nothing like that. She was an old lady. I didn't even want (UI) no trouble. I didn't even want....

SUMNER: And, and, and that's when she sat in, in there, and, uh, and the so, so then what, you got on the phone? Tell me, tell me about....

WHITFIELD: Yeah.

SUMNER: She went and sat down.

WHITFIELD: Yeah, she sat in there by herself.

SUMNER: Un hun.

WHITFIELD: And I was on the phone or looking out the, I was on the phone I think.

SUMNER: But she was asleep?

WHITFIELD: Yeah. When, when I went...

SUMNER: When, when did she, when did she go to sleep?

WHITFIELD: I really can't remember. I was on the phone. And then I came back in there and she was like this.

SAMPSON: Un hun.

SUMNER: So about five or ten minutes then?

WHITFIELD: Like I said, I was back and forth. So I, I didn't have to check on her because I, she was cooperative. The only thing I was scared that she was going to knock on the window.

SAMPSON: Un hun.

WHITFIELD: And I was like, ma'am please. And she was like I can't do nothing. I was like I'm not asking you to do nothing. I just asked you not to, you know, disturb the ... Just make it seem like I'm in here just, just leave me alone, I'll leave you alone. That's all I was asking, you know, and she, she (UI).

SUMNER: Okay lets get that fixed on the, on the statement you think?

SAMPSON: Okay. Yeah, lets go ahead, uh, and get this new information on paper.

WHITFIELD: Okay.

SAMPSON: Uh, before we go on LARRY, (UI).

SUMNER: Yeah, I about, eat me up, I, I knew there was something.

WHITFIELD: I apologize for that.

SUMNER: That's alright. That's alright. I just go ahead, you know, hey it's Friday. I'm, I'm just glad we could, we could get it done right. That, that's what it's all about is getting it done right.

SAMPSON: Two eleven eighty eight is your birth date, right?

WHITFIELD: Eight eight.

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SAMPSON: Yeah. Today is 9/26/08. The time is 9:53.

SUMNER: Did she ever, did she, uh, did you ever make sure she didn't have a phone in that office? 'Cause obviously you didn't want her to call somebody.

WHITFIELD: She was, like I said, I, I trusted..... 'Cause if she wanted to she could have screamed. She could have did anything, they was right in the back yard so I didn't even, like I said, I [33] went, I got the cordless phone, and started walking around and she didn't even. I wasn't worrying about her. As long as she, I, I kept walking by and as long as she didn't (UI) hear knocking on the door she was just calm. And all she kept saying was you need to leave. And I was like ma'am, I'm gonna leave as soon as possible. The words I remember her saying to me or me saying to her...

SUMNER: Only words you were saying, which, (UI) saying were what?

WHITFIELD: Are to do what I just said, uh, what she said uh, you need to leave. And I said, um, I, uh, man, what did I say, you need to leave, and I said I will as soon as possible. That's all it was. But it was just short and simple. We didn't even talk a whole lot. It was, you know, I just asked her...

SUMNER: 'Cause obviously, you know, you know we're gonna find out what, what, what you guys said to one another.

WHITFIELD: Yes.

SUMNER: You know, and she didn't, she didn't say, um, can I use the phone or, or, or anything like that?

WHITFIELD: No. No she never asked me to use the phone.

SUMNER: I mean, I don't.

WHITFIELD: She just, she just, you know, she was coopera-, like I said she was cooperative.

SUMNER: Un hun.

WHITFIELD: She could, she could have did a lot of things, but they were all in the area. She knew I was, I didn't have no weapon so she knew that, uh, she knew that, she knew that, um, it was (UI), she knew that I wasn't going to, you know, harm her. And so she didn't, she was calm, collective out of my way, I was out of hers.

SAMPSON: So as soon as she come from the hallway direction and toward you, you said I'm not here to hurt you.

WHITFIELD: Yes. She'll tell you I ain't, get close to her, scare her or none of that.

SAMPSON: Hm.

WHITFIELD: I was really keeping my distance from her and just letting her know that. See ma'am I'm not here to hurt you, I really just need a place to, uh, to just hide right now.

SUMNER: Did she ever say help?

WHITFIELD: Nope. If she would've said help the, uh, they was, like I said, they was right in the back yard. She could have did anything, she could have simply just knocked on the window.

SAMPSON: What did she say?

WHITFIELD: Like as what?

SAMPSON: I mean what?

WHITFIELD: She never said nothing till I got, so, like I said, she just said you need to leave.

SAMPSON: Un hun.

WHITFIELD: She never said nothing else. As far as like, she was threatening or nothing like that, she was just like, I was like, she was like, what do you want me to do. She was like, I can't help you. You need to leave. I was like ma'am I'm gonna leave as soon as possible.

SAMPSON: So she, so she told you, you needed to leave and you said ma'am ...

WHITFIELD: Yes.

SAMPSON: (UI) I won't hurt you.

WHITFIELD: No actually (UI) I'm just, I'm just trying to (UI) I didn't come here to hurt you. I just need somewhere to, uh, chill for a little bit and go (UI).

SAMPSON: Did you tell her to get in the computer room?

[34] WHITFIELD: No, I asked her.

SAMPSON: You asked her?

WHITFIELD: I asked her where was a place away from 'cause we was right there, five of them. Like I say they was right there by the back yard. Actually with, um, where could we go where they wouldn't...

SAMPSON: Un hun.

WHITFIELD: Wouldn't see (UI).

SAMPSON: Where the police couldn't see you?

WHITFIELD: Yeah.

SAMPSON: (UI) computer room. What, was that her idea or?

WHITFIELD: Who's idea was it? We just took, that was the first room.

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SAMPSON: (UI).

WHITFIELD: I was like right here.

SAMPSON: What she, what did you or her do as soon as you walked in the computer room?

WHITFIELD: I didn't, I didn't walk in. I mean I probably took a couple steps in, but I didn't go all the way through the computer, she just sat down. It's, it's two chairs, she just sat down, and I just went to get the phone. And from the computer room on I took (UI) here and there. She's like what did you want to do? You need to leave. My husband's on the way. She did say that. She said my husband's on the way. I said ma'am, I'll be out of your, I'll be out of there be, before he gets, I just really need (UI) now.

SUMNER: You, so she said my husband's on his way?

WHITFIELD: Yes.

SAMPSON: She said that a couple times, two or three times, five times?

WHITFIELD: At the most I think two. I don't remember her saying it over two times. I don't really remember her saying it two times. I just give her the benefit of the doubt (UI) two times.

SAMPSON: So we'll say she said, she just said it.

WHITFIELD: She said it.

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SAMPSON: (UI).

WHITFIELD: She did say it.

SAMPSON: Okay, hold on. My husband's on his way home?

WHITFIELD: Yes.

SAMPSON: So what was you response to that?

WHITFIELD: I'll be gone before he even gets here. I just need somewhere right, right now.

SAMPSON: Then what happened LARRY?

WHITFIELD: (UI) like that was, like I can't remember exactly if we was already in the computer room.

SAMPSON: Un hun.

WHITFIELD: And she said it. But I know she said that and, really that, like I said once we was in the computer room she wasn't, we didn't even speak as much.

SAMPSON: Un hun.

WHITFIELD: You know what I'm saying. I was on the phone. And like when I went by, she was sleeping.

SAMPSON: Un hun.

SUMNER: So you said that he was, um....

WHITFIELD: Yeah.

SAMPSON: Did you say well how did you describe that?

WHITFIELD: Like either I wasn't to say 'cause (UI) like I say, it could have been a slight move you know, change of like, from wherever, how she was sitting or it was, like it wasn't normal.

It wasn't normal 'cause I wouldn't heard it. When I heard it, [35] it what, what was that. I went in there, she was like this.

SAMPSON: How long after that was it after left the house?

WHITFIELD: Ten, maybe ten minutes. (UI) ten minutes. Might be at the max fifteen at the max.

SAMPSON: Okay. Let's read this one together LARRY. And, uh, make sure, good to go. It says during the first conversation with Detective Sampson and Sumner I made a mistake. I said I went in the back door to the old woman's house. I really went through the front. As soon as I walked through the house, I saw an older white woman coming toward me from the hallway. I don't know for sure if she came out of the computer room. I told her that I'm not here to hurt you and I told her I just needed a place to hide. She told me I needed to leave the house. I told her again I'm not here to hurt you. I asked her to go into the computer room. I asked where could we go in the house where the police couldn't see us. She sat down in the chair.

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WHITFIELD: She, uh, when we, uh, I came in she (UI) like (UI) to leave like as soon (UI) I really don't even remember what she said, but (UI) she was just like what do you want me to do. Like, (UI)...

SAMPSON: Is there something I need to take out of there?

WHITFIELD: I mean you can leave it. It, but I just (UI).

SAMPSON: Well, no I want to get it right. Tell me, tell me.

WHITFIELD: (UI).

SAMPSON: What I need...

WHITFIELD: I told her that I just need, uh...

SAMPSON: I told her that I just needed a place to hide.

WHITFIELD: Right.

SAMPSON: She told me I needed to leave her house.

WHITFIELD: Yeah. I mean, this (UI) it up anyway. So...

SAMPSON: And, and I told her again. I'm not here to hurt you. Well what about that is wrong? I mean please...

WHITFIELD: That she told me...

SAMPSON: We don't want to get it wrong.

*Appendix O*

WHITFIELD: She told me I needed to leave her....

SAMPSON: You want me to take...

WHITFIELD: But she said that, but it wasn't like, you know, what I'm saying.... It wasn't like....

SUMNER: Wasn't in the right order.

WHITFIELD: Yeah. You know.

SUMNER: So at that point you want to, does it make more sense to say what do you want me to do instead of you need to leave?

WHITFIELD: Yeah. Yes.

SUMNER: What do you want me to do?

WHITFIELD: What do you want me to do? (UI).

SUMNER: Yeah.

WHITFIELD: And I said I'm not...

SUMNER: How about, how about, how about just mark that out and just put above it what do you want me to do that.

SAMPSON: So take out she told me I needed to leave, take that out?

*Appendix O*

WHITFIELD: I mean she said that, you can leave....

SUMNER: You can probably...

SAMPSON: But she did say that?

WHITFIELD: Yeah, she did say that.

SAMPSON: So we can leave it and just put down here, she just....add it.

WHITFIELD: Yeah. That'll work.

SAMPSON: She asked me to leave.

WHITFIELD: Yes. 'Cause she said when I needed to leave, she said it was because her husband was coming home.

[36] SUMNER: Un hun.

WHITFIELD: She said my husband's coming home, you need to leave.

SAMPSON: And this is when you first entered?

WHITFIELD: No. This is like within the first five minutes of me entering. When I first came in, she was startled, you know. She thought I was going to rob her, but I said I, my head hurts, look I don't have no guns no weapons. I just need a place to hide. What you want me to do? You don't have to do nothing. Please just go (UI).

SAMPSON: So you're telling me sometime within five minutes of you being in the house she asked you to leave?

WHITFIELD: Yes.

SUMNER: (UI) warmed up a bit. A little bit.

WHITFIELD: It's off and on. It's like...

SUMNER: (UI) you getting cold chills.

WHITFIELD: Like...

SUMNER: Well wrap up on that thing if you need to.

WHITFIELD: I'm gonna stay wet 'cause my socks wet (UI).

SUMNER: Oh yeah, yeah.

WHITFIELD: 'Cause it's water, so it's really not going to (UI).

SUMNER: Right.

WHITFIELD: It's starts from the bottom coming up.

SUMNER: Did you go through a creek or a river?

WHITFIELD: Yeah.

SUMNER: Did you swim?

WHITFIELD: No.

SUMNER: Just a creek?

WHITFIELD: (UI) just had to walk like, all the way up, it wasn't that high, it was just, water like this. This, this tall.

SUMNER: Un hun.

SAMPSON: Okay. So do you want me to take that line out where it says, uh...

WHITFIELD: You can take...

SAMPSON: She told me...

WHITFIELD: Right. You can take that part out right there. Did you put it down?

SAMPSON: Yeah.

WHITFIELD: Okay, so you can take it out right there because she told me a little later.

SAMPSON: How's that?

WHITFIELD: (UI) I told her I'm not going to hurt her.

SAMPSON: Um hm.

WHITFIELD: This one 'cause it don't make sense no more 'cause she didn't say that yet.

*Appendix O*

SAMPSON: So I told her I just needed a place to hide. Then it says I told her, what we just, take out again.

WHITFIELD: Yes.

SAMPSON: That way now it makes sense. Now it says, I told her I'm not here to hurt her.

WHITFIELD: Yes.

SAMPSON: Okay. Alright. So I asked her to go to the computer room. I asked her where we could go in the house so police couldn't see us. She sat down in a chair. I went and got a telephone and made some phone calls. She asked me several times, what was I going to do.

WHITFIELD: No, what she, what she said, what do I need to do. What do you want me to do?

SAMPSON: What do you want me to do?

WHITFIELD: What do you want me to do, that's what she said.

SUMNER: Yeah, I remember you saying that now.

SAMPSON: (UI) what do you want me to do. Okay. She said my [37] husband's on his way home. I told her I would be gone soon. I walked back into the computer room and she was sleeping. I could hear her breathing, but her rhythm was unnormal. I left the house around ten minutes later. Sometimes (UI) five minutes. This is where we went back (UI).

WHITFIELD: Okay.

SAMPSON: Sometime around five minutes into me being in the...

WHITFIELD: Un hun.

SAMPSON: House, she asked me to leave, and said her husband was on his way home.

WHITFIELD: Okay.

SAMPSON: Look good?

WHITFIELD: Yes. Sounds good.

SAMPSON: Um, put your Initials there. Sign it right there and we'll do it the same way.

SERGEANT REYNOLDS: One last thing for, uh, I got a question LARRY. The uh, the, the, knife that you had from the original house....

WHITIFIELD: Yeah.

SERGEANT REYNOLDS: What did you do with that?

WHITFIELD: I, uh, it's like not too far from the original house.

SERGEANT REYNOLDS: Did you take it into the sec, second house?

*Appendix O*

WHITFIELD: No. I definitely took it to, it's close, it's close, in the back yard as if I was running. I just let it go like, I don't, I can't remember if it was exactly the back yard, but it, not far from her.

SERGEANT REYNOLDS: Did you, not from the first house....

WHITFIELD: Yes. Not far from the first house.

SERGEANT REYNOLDS: Did you throw it or did you just drop it?

WHITFIELD: I just dropped it.

SERGEANT REYNOLDS: Okay. Ain't no problem.

SAMPSON: Want you to add something right here. Put the time, it's going to be nine seven (UI) time today. Nine thirty-five on that and it's not nine-thirty.

SUMNER: You may have meant eight thirty-five.

WHITFIELD: Am I able to use the bathroom?

SUMNER: Yeah.

SAMPSON: LARRY, put your initials where I made that correction on the time. Put your initials right there.

SUMNER: You go to the bathroom now?

*Appendix O*

WHITFIELD: I mean whenever, like as soon as...

SAMPSON: I, will you put your initials right here, here and here. Everywhere you see we made a correction. We'll let you go use the bathroom LARRY.

WHITFIELD: Appreciate it.

SAMPSON: Probably go myself.

SUMNER: Need something to drink.

SAMPSON: Yeah, me too. Draw a line right here LARRY and put you initials right there.

WHITFIELD: (UI).

SAMPSON: Good, good, good, good deal. Good deal. Uh, one more place LARRY, right there, put your initial. Think I can get a (UI). Uh, (UI) lets go use the bathroom. I don't know where it's at.

SUMNER: I don't either. It's alright, don't worry about it seriously.

SAMPSON: This just for (UI).

(TALKING IN THE HALLWAY)

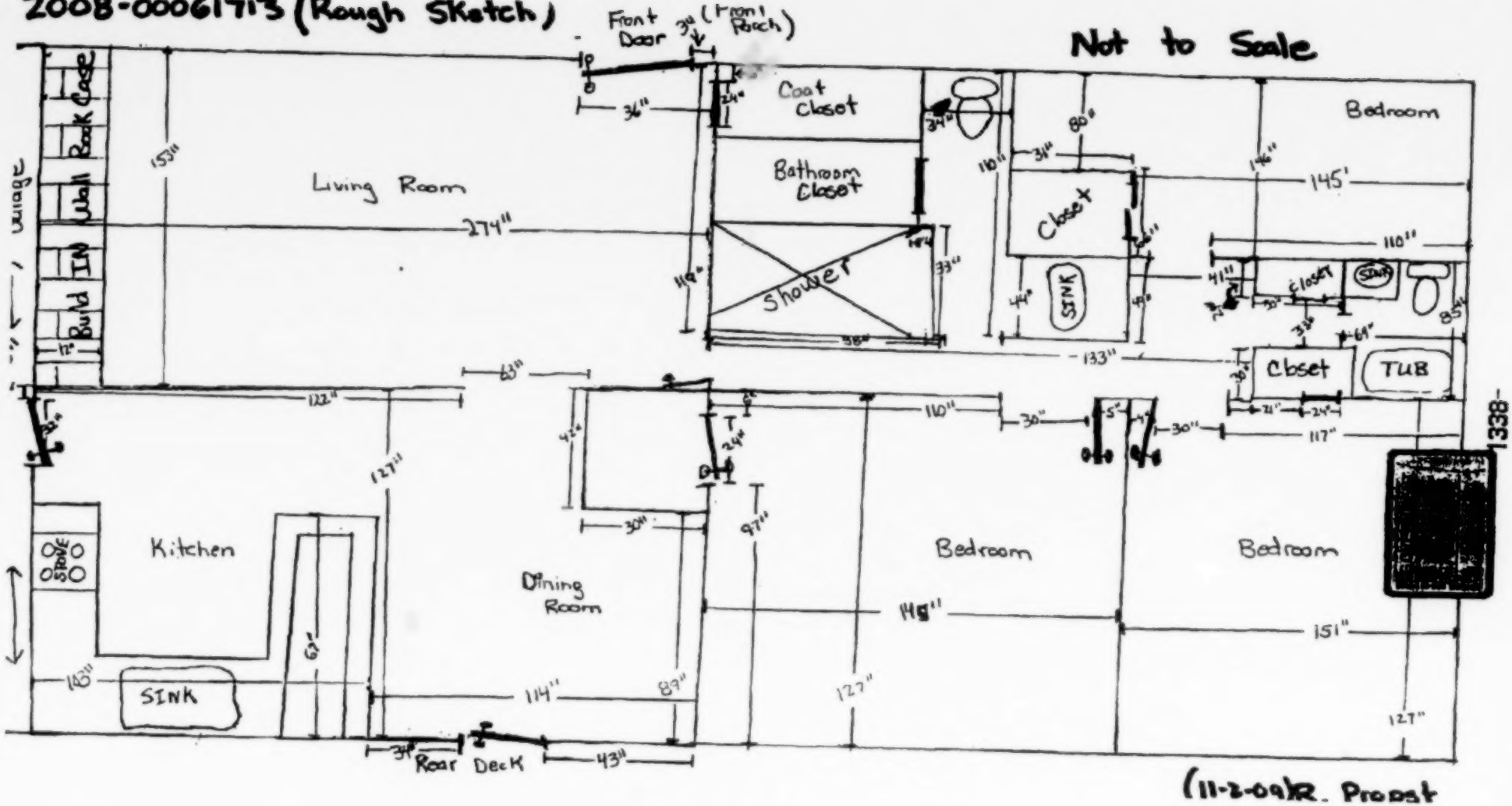
SAMPSON: I'm actually warm in here.

SUMNER: Yeah. I think it's body heat. I ain't never put a coat on a man. All mighty.

# GOVERNMENT EXHIBIT 45

2008-00061713 (Rough Sketch)

Not to Scale




(11-2-09) R. Proost

# PETITIONER'S BRIEF

No. 13-9026

IN THE

# Supreme Court of the United States

LARRY WHITFIELD,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF PETITIONER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## QUESTION PRESENTED

A conviction under the federal bank robbery statute carries a maximum sentence of 20 years in prison, but no minimum sentence. 18 U.S.C. § 2113(a). If the bank robber forces another person "to accompany him" in committing the robbery or while in flight, however, that additional offense carries a minimum sentence of ten years in prison and a maximum sentence of life imprisonment. 18 U.S.C. § 2113(e).

The question presented is whether § 2113(e)'s forced-accompaniment offense requires proof of more than a *de minimis* movement of the victim.

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## OPINIONS BELOW

The Fourth Circuit's first opinion in this case, JA 24a-66a, is published at 695 F.3d 288.[1] The district court's sentencing order on remand, JA 67a-74a, is unpublished. The Fourth Circuit's second opinion, JA 18a-22a, is unpublished, but is reprinted at 548 F. App'x 70.

## JURISDICTION

The Fourth Circuit entered its judgment on December 10, 2013. Larry Whitfield timely filed a petition for certiorari on March 7, 2014. This Court granted the petition on June 23, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

This case involves an application of 18 U.S.C. § 2113(e). The full text of § 2113 is reprinted in an addendum at the end of this brief.

## STATEMENT OF THE CASE

The federal bank robbery statute creates a series of increasingly serious offenses that carry increasingly serious penalties. *See* 18 U.S.C. § 2113. Subsection (a) defines the basic offense and sets a 20-year statutory maximum. 18 U.S.C. § 2113(a). Subsection (d)

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[1] Due to Petitioner's *in forma pauperis* status, the petition appendix in this case was not filed in booklet form. All materials from that appendix are reprinted for the Court's convenience in the joint appendix pursuant to Rule 26.1.

increases the maximum to 25 years for an aggravated offense where the bank robber uses "a dangerous weapon or device" to "assault[] any person, or put[] in jeopardy the life of any person." 18 U.S.C. § 2113(d).

Subsection (e), the provision at issue in this case, covers the most serious conduct and imposes the most serious penalties. It sets a 10-year mandatory minimum and a maximum of life if the robber "forces another person to accompany him" in committing the robbery or while in flight. 18 U.S.C. § 2113(e). It also provides a mandatory minimum of life in prison if the victim dies as a result of the forced accompaniment or if the robber kills someone (separate and apart from any forced-accompaniment offense). *Id.*

Consistent with both the statutory text and the logic of § 2113's tiered penalty structure, the Fifth and Tenth Circuits have held that subsection (e)'s forced-accompaniment offense requires more substantial movement of a victim than what occurs in an ordinary bank robbery. (Think of the robber who orders a teller to retrieve money from the vault or a customer to lie down on the floor.) *See United States v. Reed*, 26 F.3d 523, 527-28 (5th Cir. 1994); *United States v. Marx*, 485 F.2d 1179, 1186 (10th Cir. 1973).

In this case, by contrast, the Fourth Circuit held that § 2113(e) and its dramatically escalated penalties apply to any forced movement, no matter how insubstantial. That broad construction was necessary to sustain Whitfield's § 2113(e) conviction because, as the court of appeals noted, the "forced accompaniment" in question covered "only a short distance" entirely "within [the victim's] own home," which Whitfield

entered, unarmed, while fleeing after a failed robbery attempt. JA 65a. If something more than *de minimis* movement is required, Whitfield's conviction cannot stand.

The Fourth Circuit's judgment must be reversed. Its expansive interpretation conflicts with the statute's plain text and § 2113's escalating penalty structure. Under the Fourth Circuit's view, the enhanced penalties for a forced-accompaniment offense are not reserved for especially egregious bank robbery offenses, but instead could be applied—in the hands of a zealous prosecutor—to virtually every bank robbery offense. This Court should reject that interpretation and hold that the enhanced penalties of § 2113(e) are triggered only by *substantial* movement, such as where a defendant takes a hostage with him in escaping from the bank.

### A. Factual Background

In September 2008, Larry Whitfield was a 20-year-old with a high-school diploma and no criminal record. His mother was serving an extended tour of military duty overseas, leaving Whitfield alone to care for himself and his younger brother. Unable to carry this burden financially and overwhelmed by the recent loss of his job and car, Whitfield decided—together with Quanterrious McCoy—to rob a credit union in Gastonia, North Carolina. CAJA 437-38.[2] But as they attempted to enter the credit union a metal detector triggered an

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[2] "CAJA" refers to the Joint Appendix filed in the court of appeals.

automatic lock on the inner doors. This prompted Whitfield and McCoy to drive away, but McCoy eventually lost control of the car and got stuck in a median. JA 26a; CAJA 423-25. The two men then fled on foot into the woods, discarded two firearms, and separated from one another. JA 26a.

Now unarmed, Whitfield first hid in the home of Tina Walden, who was away at work. When Walden returned home, Whitfield confronted her at the front door with a kitchen knife in his hand, which caused her to run away. JA 26a; CAJA 533-34. Whitfield also fled, discarded the knife, and next entered the unlocked home of Mary and Herman Parnell. Mrs. Parnell, a 79-year-old woman with heart disease and high blood pressure, was home alone, but not in the room where Whitfield entered. JA 111a-112a, 154a-155a; CAJA 813, 1177. She became upset and began crying when she saw Whitfield, but he said to her, "I don't have no weapons and I'm not here to hurt you. I just need somewhere to stay." JA 26a-27a, 155a.

At that point, Whitfield engaged in the conduct underlying his forced-accompaniment conviction. The government's sole evidence of this conduct came from Whitfield's answers to extensive police questioning and two officer-written statements that he signed during his interrogation.[3] In one statement Whitfield said that he "asked [Mrs. Parnell] where could we go in the

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[3] He later confessed to the attempted bank robbery as well, but the district court suppressed that portion of his confession after finding that it was given involuntarily as the result of coercive police tactics. JA 28a, 32a-33a; CAJA 1370-82.

house where the police couldn't see us" and that he "asked her to go into the computer room." JA 128a. During questioning Whitfield explained that he first met Mrs. Parnell as she was "coming from the hallway." JA 154a. Then, when he asked where they could go to not be seen, they "just took . . . the first room [i.e. the computer room]." JA 35a, 162a. Mrs. Parnell "sat down" on a chair, while Whitfield "took a couple steps in" to the room but then "went [to another room] to get the phone." JA 163a.

Whitfield initially agreed with the officer's suggestion that he "guide[d]" Mrs. Parnell to the computer room. JA 35a, 156a. But he immediately clarified that he hadn't touched her:

> Like I didn't, no. I didn't . . . . I just know, she, she was in front of me and she went into the computer room. I don't remember to-, I really don't remember touching her. Like come on, ma'am . . . . I was cooperative with her and she was cooperative with me. I didn't put my hands on her.

JA 35a, 156a. Consistent with Whitfield's clarification, the investigation revealed "no evidence" that Mrs. Parnell had suffered "any recent bruises, injuries, [or] things of that nature" and "[n]o evidence of violence." JA 110a-111a. The trial evidence showed that Mrs. Parnell's movement from the hallway to the computer room was between four and nine feet. *See* JA 81a (testimony of Mr. Parnell that the computer room was "about eight feet down the hallway on the right"); JA 176a (rough diagram of house with inconsistent measurements, which shows that the computer room—

which is the first "bedroom" on the right—is 110 inches down the hallway, but is just past and across from a doorway that is 38 inches down the hallway).

While in the Parnell home, Whitfield sent a text message to a friend, Tamecia Sanders, who agreed to pick him up. JA 26a-27a. During a subsequent phone call with Whitfield, Sanders overheard Whitfield say to Mrs. Parnell, "[M]a'am, just calm down. I'm probably more scared than you are, and I'm actually just trying to leave." JA 27a, 87a.

Soon thereafter, Mrs. Parnell agreed to speak to Sanders on the phone to provide directions to the Parnell home. According to Sanders, she deduced that Mrs. Parnell had been "afraid at first" (i.e. when Sanders overheard Whitfield ask her to calm down). JA 92a. But Sanders said that by the time they spoke on the phone Mrs. Parnell "sounded calm" and was "relieved" that Sanders was nearby. JA 27a, 86a-88a, 101a. Ultimately, however, Sanders was unable to reach the Parnell home because the police had blocked off the street. JA 102a-103a.

While Whitfield was still on the phone with Sanders, Mrs. Parnell developed difficulty breathing. JA 27a. Sanders overheard Whitfield ask Mrs. Parnell if he "could get her a glass of water" or "any aspirin or anything that she usually takes." JA 27a, 103a-104a. Sanders suggested that Whitfield give Mrs. Parnell "a minute" and then call an ambulance. JA 27a. Whitfield soon informed Sanders that it appeared Mrs. Parnell had stopped breathing and seemed unconscious, but that he was too scared to go into the room to check on

her. JA 107a-108a. Whitfield then began crying on the phone. JA 109a.

A few minutes later Whitfield ended his call with Sanders when he heard someone knocking on the front door. JA 27a-28a. He ran from the house and hid in the woods, where he was ultimately apprehended. *Id.*; JA 134a-135a. Mrs. Parnell was later found dead in a chair in the computer room of her home, having suffered a heart attack. JA 28a.

### B. Proceedings Below

A grand jury in the Western District of North Carolina indicted Whitfield on four charges. The first three alleged (1) attempted bank robbery in violation of 18 U.S.C. § 2113(a) (Count One), (2) conspiracy to use a firearm during the attempted robbery in violation of 18 U.S.C. § 924(c) & (o) (Count Two); and (3) carrying a firearm during the attempted robbery in violation of 18 U.S.C. § 924(c) (Count Three). The fourth and most serious charge alleged that while trying to avoid apprehension for the attempted bank robbery, Whitfield "forced [Mrs. Parnell] to accompany him without her consent, and killed [her]," in violation of 18 U.S.C. § 2113(e) (Count Four). JA 29a-30a.

In seeking to prove "forced accompaniment," the government's primary theory was that Whitfield had confined Mrs. Parnell to her home. Indeed, the government repeatedly conflated accompaniment with confinement. In its opening statement, for example, the government argued that Whitfield "forced Mrs. Parnell to accompany him against her will. That means, basically, held her against her will." CAJA 248; *see also*

CAJA 250 (again equating "forcing Mrs. Parnell to accompany him" with "holding her against her will"). The government returned to this theme in its closing, arguing that Whitfield should be convicted of forced accompaniment because Mrs. Parnell had been "held against her will." CAJA 1202-03.

The government also alleged that Whitfield was liable for "killing" Mrs. Parnell under § 2113(e), but it never alleged that he touched her or harmed her intentionally. At trial it sought to prove the "killed" offense with expert testimony contending that Whitfield's presence in Mrs. Parnell's home caused a fatal cardiac arrhythmia. CAJA 248-50 (opening statement); CAJA 1179-80 (closing argument).

At the end of trial the district court used a special verdict form on Count Four. It asked the jury to decide (1) whether Whitfield killed Mrs. Parnell; (2) whether he forced her to accompany him; and, (3) if yes as to (2), whether the forced accompaniment resulted in Mrs. Parnell's death. JA 42a-43a, 119a.

The court's instructions on Count Four included no minimum limit on the degree of accompaniment necessary to establish the forced-accompaniment offense. Instead, the court instructed the jury that "accompaniment" includes "forcing a person to move from one part of a building to another against her will." JA 42a, 116a. It further instructed that the government was "not require[d] . . . [to] show that the defendant crossed a property line, moved a person a particular number of feet, held the person for a particular period of time, or placed the person at a certain level of danger." JA 41a-42a, 116a.

The jury deliberated for nearly four hours and asked several questions about the instructions on Count Four's forced-accompaniment offense. JA 42a. Ultimately, the jury found Whitfield guilty of Counts One through Three. On Count Four, it found him not guilty of killing Mrs. Parnell but guilty of "forced accompaniment result[ing] in [her] death." JA 119a.

At trial Whitfield repeatedly, and unsuccessfully, moved under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal on Count Four. CAJA 1084-87 (close of government's evidence); CAJA 1165 (close of defense evidence); CAJA 1274-75 (following jury verdict). He argued, among other things, that there was insufficient evidence "that Mr. Whitfield forced Ms. Parnell to accompany him anywhere." CAJA 1087.

The district court sentenced Whitfield to life imprisonment, which was the mandatory minimum under § 2113(e) based on the "death results" conviction. JA 43a-44a. As required by U.S. Sentencing Comm'n, Guidelines Manual ("U.S.S.G.") § 5G1.2 (Nov. 2013), the district court also imposed concurrent, statutory-maximum sentences of 240 months on Counts One and Two, as well as a consecutive 60-month sentence on Count Three. JA 43a.

On appeal Whitfield advanced several arguments challenging his conviction. As relevant here, Whitfield identified the circuit conflict regarding the scope of § 2113(e)'s forced-accompaniment offense and argued both that the government failed to prove facts sufficient to show a forced accompaniment and that the jury instructions defined forced accompaniment too

broadly. Brief of Appellant, No. 10-5217 (4th Cir. July 27, 2011), at 39-40, 50-52. The Fourth Circuit disagreed. It acknowledged that "Whitfield required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period." JA 65a. But, citing its prior decision in *United States v. Turner*, 389 F.3d 111 (4th Cir. 2004), the court held that "no more is required" under § 2113(e). JA 65a.

Although the court of appeals affirmed the basic forced-accompaniment conviction, it vacated Whitfield's conviction for the additional death-results offense. It reasoned that the "death results" terminology in § 2113(e) prescribes an element of a separate offense rather than a sentencing factor. JA 56a-58a. Because Count Four of the indictment charged a killing offense and a forced-accompaniment offense, but not a death-results offense, the court held that the district court violated the Grand Jury Clause by instructing the jury on the uncharged death-results offense. JA 55a-64a. The court thus vacated the death-results conviction, along with the mandatory life sentence that it required, and remanded for resentencing. JA 63a-64a.

On remand, the district court concluded that the advisory guideline range for Count Four's forced-accompaniment offense was life imprisonment based on a cross-reference to the first-degree murder guideline. Supp. CAJA 70.[4] The court then granted a five-level departure, which the murder guideline recommends in cases where the defendant did not intentionally cause

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[4] "Supp. CAJA" refers to the Supplemental Joint Appendix filed in the court of appeals.

the death. JA 123a-124a; U.S.S.G. § 2A1.1 cmt. 2(B). Based on an adjusted advisory range of 235 to 293 months, the court imposed a 264-month sentence on Count Four, to be followed by a mandatory consecutive term of 60 months on Count Three. JA 70a.

If Whitfield had been sentenced for the basic bank robbery offense, rather than the aggravated forced-accompaniment offense, his advisory range would have been 70 to 87 months on Counts One and Two, plus the consecutive, 60-month term on Count Three. CAJA 1670-71 (presentence report calculations for Counts One and Two); U.S.S.G. § 5A (sentencing table).

On December 10, 2013, the Fourth Circuit affirmed Whitfield's sentence. JA 18a-22a. Whitfield timely filed a petition for certiorari, which this Court granted on June 23, 2014.

## SUMMARY OF ARGUMENT

The court of appeals affirmed Whitfield's conviction on the premise that § 2113(e)'s forced accompaniment provision reaches any forced movement, no matter how insubstantial. That premise is erroneous, and reversal is warranted.

When first enacted, § 2113(e) was one of only a handful of federal crimes punishable by death, and the provision today still carries the highest penalties for any bank robbery that does not result in death. In setting out these heightened penalties, Congress required correspondingly culpable conduct. Pointedly, Congress did *not* expose defendants to § 2113(e)'s enhanced penalties for forcibly confining a victim

against his will, conduct that is typical of most bank robberies. Instead, the provision's text, structure, and purpose all establish that § 2113(e) was intended for the relatively rare situation in which a defendant forces a victim to travel with him for a *substantial* distance, such as when a robber takes a hostage out of the bank to facilitate his escape. Here, by contrast, Whitfield required Mrs. Parnell to move only a few feet within her own home while he waited for a friend to pick him up. This Court should hold that § 2113(e), with its mandatory minimum sentence of ten years, does not reach that type of *de minimis* movement.

1. Beginning with the text, § 2113(e) applies when a robber forces a "person to accompany him" in committing the robbery or while in flight. The word "accompany" itself suggests substantial movement: one does not typically "accompany" another over a distance of a few feet. Section 2113(e) was originally enacted in 1934 and authorities from that time, including dictionary definitions and the contemporary U.S. Code, confirm that the word "accompany" was most typically used to denote travel together over a substantial distance.

2. Even if the plain text left some doubt, the broader structure of § 2113 demonstrates that § 2113(e) requires more than *de minimis* forced movement. As explained above, § 2113 sets forth a series of graduated crimes, with § 2113(e) addressing the most serious conduct and imposing the most serious penalties.

Reading § 2113(e) as broadly as the government and the court of appeals—so that it covers even *de minimis* movement in the context of a brief confinement—would

gut the logic of § 2113's penalty structure. Because conduct of that nature is present in most bank robberies, the government's interpretation would all but erase the statutory distinction between a basic offense under § 2113(a) and an aggravated offense under § 2113(e).

Moreover, when § 2113(e) was enacted, Congress made it one of the handful of *capital* crimes in the U.S. Code, on par with murder, treason, and rape. It is inconceivable that Congress considered *de minimis* forced movement of a victim during a robbery—conduct that would be present in most robberies—to warrant capital punishment.

3. The statute's historical background and legislative history confirm that Congress intended § 2113(e) to cover a narrow set of especially egregious conduct, not the type of *de minimis* forced movement at issue here. Just weeks before the Senate passed the bank robbery statute in 1934, John Dillinger committed the latest in a string of highly publicized bank robberies in which he used hostages as human shields while fleeing from the bank. Congress surely had conduct of that sort in mind when it made forced accompaniment a capital offense.

Indeed, the House Report and other articles of legislative history repeatedly refer to § 2113(e) as the "kidnapping" provision. While Congress clearly did not import the elements of the federal kidnapping statute into § 2113(e), it is instructive that the contemporary understanding of kidnapping—as shown by the federal statute, the common law, and dictionary definitions—

required substantial movement of the victim, not just confinement for a brief period.

4. The government's broad interpretation should also be rejected because it produces at least two absurd results. First, under the government's interpretation, an unarmed robber who follows a few steps behind a teller retrieving money from the vault would face significantly higher statutory penalties than one who shoots and (non-fatally) wounds the teller. Second, the applicability of § 2113(e)'s severely enhanced penalties would turn on a trivial distinction irrelevant to culpability: whether the robber who directs a bank employee's movement stands still while the employee complies or instead takes a few steps in the same direction. These absurd results cannot be what Congress intended.

5. At the very least, the statute's text, structure, history, and purpose do not permit the Court to conclude that § 2113(e) unambiguously covers *de minimis* victim movement of the type present here. Accordingly, the rule of lenity requires interpreting the provision narrowly to require substantial victim movement, such as where a robber flees with a hostage.

6. If § 2113(e) requires anything more than *de minimis* movement, Whitfield is entitled to acquittal. It is undisputed that Whitfield required Mrs. Parnell to move only a few feet within her own home. Movement of only a few feet within a building, which occurs in virtually every bank robbery, is too insubstantial to qualify as forced accompaniment. Accordingly, no reasonable jury could conclude that Whitfield violated § 2113(e).

For these reasons, this Court should reverse the judgment of the Fourth Circuit and remand this matter for resentencing.

## ARGUMENT

### I. The Statutory Text, Structure, History, And Purpose Demonstrate That § 2113(e) Requires Substantial Movement Of The Forced-Accompaniment Victim

The Fourth Circuit affirmed Whitfield's conviction on the premise that § 2113(e)'s forced-accompaniment provision covers any forced victim movement, no matter how insubstantial. That broad, nearly limitless, reading of § 2113(e) is flawed. A proper interpretation requires substantial victim movement, meaning that Whitfield's conviction cannot stand.

#### A. Text

Statutory construction begins with the "language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Absent a prescribed definition, this Court gives statutory language its "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). In determining meaning, statutory "terms must be read in their statutory context." *United States v. Tinklenberg*, 131 S. Ct. 2007, 2012 (2011).

The plain text of the statute provides that § 2113(e)'s enhanced penalties apply only if the defendant forced another person "to accompany him" in committing the robbery or while in flight. In everyday

American English, the word "accompany" is used most often in the context of substantial movement, to denote travel to someplace else. For example: "Will you accompany me to the theater?" or "They accompanied their parents on a cruise." It would be awkward, at best, to use the word in situations where little or no movement is required: "Please accompany me to the far side of the room" or "Will you accompany me as we stay home tonight?" Even if that usage is grammatically permissible, it is decidedly uncommon.

As demonstrated below, dictionary definitions and the contemporary U.S. Code confirm that the word "accompany" typically means movement over a substantial distance.

### 1. *Dictionaries*

Dictionaries from the time of the statute's passage (in 1934) indicate that the primary use of the word "accompany" was in the context of a companion or escort. For example, the New Standard Dictionary of the English Language (1st ed. 1931) defined "accompany" as "[t]o go with, or be associated with, as a companion, an attendant, or a retinue; escort or convoy; also, to go or be sent with as an incidental or concomitant." *Id.* at 20; *see also Webster's New International Dictionary of the English Language* 16 (2d ed. 1934) (third definition: "To go with or attend as a companion or associate; to go along with; to consort with"). These contexts suggest more than *de minimis* movement: a person typically does not act as an

"escort," "companion," or "attendant" for just a few feet.[5]

Likewise, the 1933 version of Black's Law Dictionary defines "accompany" as "to go along with." *Black's Law Dictionary* 25 (3d ed. 1933). "Go along with" is usually used in connection with significant movement. While you might "go along with" someone on a road trip, you typically do not "go along with" someone to the living room.[6] The typical use of "accompany" is inconsistent with the *de minimis* movement that occurred in this case. *See, e.g., Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 301 (1989) (the court must give a word its "most common meaning," according to how it is "ordinarily used" in "everyday speech").

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[5] These definitions are consistent with etymology of the word "accompany," which is derived from the French word "accompagner," which itself is a modification of the French word for "companion." *See Webster's, supra* p. 16, at 16. Thus, "accompany" means "to be someone's companion." One would not say that someone is a "companion" when travelling together for a few feet. *See, e.g., Muscarello v. United States*, 524 U.S. 125, 128 (1998) (using etymology of the word "carries" to determine its modern meaning).

[6] Modern dictionaries provide similar definitions that suggest substantial movement. *New Oxford American Dictionary* 10 (3d ed. 2010) ("to go somewhere with (someone) as a companion or escort: the two sisters were to accompany us to New York / he was at the banquet accompanied by his daughter"); *Black's Law Dictionary* 18 (9th ed. 2009) ("[t]o go along with another; to attend"); *Webster's Third New International Dictionary* (2000) ("To go with or attend as an associate or companion: go along with").

### 2. *Statutory Language*

The contemporary U.S. Code confirms that the word "accompany" requires substantial movement. *Cf. Perrin*, 444 U.S. at 37 (considering statutory usages of the word "bribery" from the period in which the statute in question was enacted). We have canvassed the 1934 version of the U.S. Code for the word "accompany" used in the sense of one person accompanying another. In *every* instance, it is plain from context that "accompany" is used solely to refer to substantial movement.

For instance, Congress frequently used the word "accompany" to mean "go with someone into the United States," such as where Congress imposed a tax on aliens entering the United States, but provided that the tax would not apply to "children under sixteen years of age who accompany their father or mother" to this country. 8 U.S.C. § 132 (1934); *see also, e.g., id.* § 145 (increasing fine for bringing aliens with certain disabilities or diseases to the United States "if such alien is accompanied by another alien who is excluded from admission" under another provision of the Code); *id.* §§ 154, 156, 203, 204(c), 204(d), 206(a)(1)(A), 212(a), 213(a), 213(c), 243. In other contexts, Congress used the word "accompany" to refer to movement from one location to another, completely different location. For example, the 1934 Code provided for immigration inspectors to "accompan[y]" "aliens in transit from ports of landing to . . . interior [immigrant] stations." *See id.* § 161.

The Code is replete with examples from outside the immigration context as well. *See* 28 U.S.C. § 302 (1934)

(providing that "[a]ny judge who . . . attend[ed] a session of [a patent] court at any place other than the city of Washington" was entitled to reimbursement for "his actual and necessary expenses incurred for travel and attendance, and the actual and necessary expenses of one stenographic clerk who may accompany him" to such other place); 49 U.S.C. § 22(1) (1934) ("nothing in this chapter shall be construed to prohibit any common carrier from carrying any totally blind person accompanied by a guide at the usual and ordinary fare charged to one person"); 10 U.S.C. § 1473(d) (1934) (describing individuals "accompanying" military troops in their movements both outside the United States and into "the field").

These authorities confirm what an everyday English speaker already knows: the word "accompany" is typically used to denote travel together for a substantial distance, not merely movement for a few feet.

### B. Context and Structure

Even if the word "accompany" could be read in isolation to encompass offenses that involve only *de minimis* movement, the broader statutory context forecloses that result. *See Abuelhawa v. United States*, 556 U.S. 816, 819-20 (2009) ("[B]ecause statutes are not read as a collection of isolated phrases, a word in a statute may or may not extend to the outer limits of its definitional possibilities") (internal quotation marks, alteration, and citation omitted); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2441 (2014) (noting the "fundamental canon of statutory

construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (quotation marks omitted)).

Indeed, this Court has routinely (and recently) emphasized that statutory phrases must be interpreted in light of the broader statutory context. *Compare United States v. Castleman*, 134 S. Ct. 1405 (2014) (relying on statutory context to conclude that "physical force" as used in 18 U.S.C. § 921(a)(33)(A) requires only "offensive touching") *with Johnson v. United States*, 559 U.S. 133 (2010) (relying on statutory context to conclude that "physical force" as used in 18 U.S.C. § 924(e)(2)(B)(i) requires "violent force," not just "offensive touching"). That principle carries added weight where the provision at issue constitutes an aggravated offense and imposes a mandatory-minimum sentence that restricts the authority of district court judges to fashion sentences in light of the case-specific factors they must consider under 18 U.S.C. § 3553(a).

Here, the statutory context—especially the structure of § 2113's graduated penalty scheme and the fact that Congress treated forced accompaniment as a capital crime for 60 years—demonstrates that a § 2113(e) offense requires substantial victim movement. Cases involving highly aggravated conduct, such as robbers abducting and fleeing with bank customers, qualify for the § 2113(e) enhancement; cases involving *de minimis* movement do not.

1. *Section 2113(e) must be interpreted in light of the statute's graduated penalty structure.*

Most important, construing § 2113(e) to cover *de minimis* movement is inconsistent with § 2113's graduated penalty structure.

Section 2113(a), which criminalizes bank robbery "by force and violence, or by intimidation," imposes a statutory maximum sentence of 20 years. Section 2113(d) increases the maximum to 25 years for a bank robber who "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." Finally, § 2113(e), the provision at issue here, imposes the most serious penalties. For a robber who "forces any person to accompany him without the consent of such person" in committing the robbery or while in flight, § 2113(e) provides for a mandatory-minimum sentence of 10 years and an implied maximum sentence of life in prison.[7] *See Jones v. United States*, 526 U.S. 227, 236 (1999) (characterizing § 2113(d) and (e) as "defining an aggravated form of [bank] robbery").

The graduated penalty structure demonstrates that Congress viewed a forced-accompaniment offense as significantly more serious than an offense in which the robber "uses a dangerous weapon or device" to commit an assault or put a person's life in jeopardy. Indeed,

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[7] *See United States v. Turner*, 389 F.3d 111, 120-21 (4th Cir. 2004) (collecting cases holding that the implied maximum under § 2113(e) is life in prison); *see also* JA 21a-22a (applying *Turner* to conclude that the statutory maximum for Whitfield's § 2113(e) conviction is life).

the large differential in statutory ranges—0 to 25 years under § 2113(d) versus 10 years to life under § 2113(e)—suggests that Congress viewed forced accompaniment as a much more serious offense.

Yet under the government's interpretation, adopted by the Fourth Circuit, forced accompaniment would include conduct that occurs routinely in, and is merely incidental to, ordinary bank robberies. For instance, if the government were correct, a bank robber who directs a teller toward the bank safe and follows her in that direction would be guilty of forced accompaniment. The same would be true for the robber who directs a customer to move from the window to the back wall and then takes a few steps in that direction himself.

That result makes little sense. Because bank robbers almost invariably exert some control over the movement of the bank's employees (and any customers present), the government's interpretation would largely collapse the distinction between ordinary offenses under § 2113(a) and aggravated offenses under § 2113(e). Surely Congress did not intend for § 2113(e)'s severely enhanced penalties to apply so broadly. *See Reed*, 26 F.3d at 527-28 ("Within the context of a bank robbery, there will often be movement within the bank by a bank employee—movement orchestrated by the robber. This orchestration will no doubt sometimes occur in concert with the movement of the robber himself. To conclude such circumstances are an aggravating accompaniment would likely convert numerous ordinary . . . bank robberies to aggravated bank robberies with only the faintest of distinctions.").

This Court has previously relied on a similar observation—that Congress could not have intended to collapse § 2113's basic and aggravated offenses—when interpreting the scope of § 2113(d). In *Simpson v. United States*, the Court resolved a circuit split by holding that "use of a dangerous weapon or device" in § 2113(d) modifies both "puts in jeopardy the life of any person" and "assaults any person." 435 U.S. 6, 11 n.6 (1978), *superseded by statute on other grounds, as recognized in United States v. Gonzales*, 520 U.S. 1, 10 (1997). Although the presence of a comma in § 2113(d) would normally suggest that "assaults any person" is a stand-alone phrase, the Court rejected that construction. *Id.* It reasoned that virtually every offense under § 2113(a)—which requires a taking of bank property "from the person or presence of another . . . by force and violence, or by intimidation"—would include an "assault." Thus, if § 2113(d) applied to every robbery that involved assault, the statutory distinction between a basic offense under § 2113(a) and an aggravated offense under § 2113(d) would largely collapse. To avoid that result and "give lawful meaning to Congress' enactment of the aggravating elements in 18 U.S.C. § 2113(d)," the Court interpreted the dangerous-weapon modifier to apply to both the assault provision and the putting-in-jeopardy provision. *Id.* So too here: § 2113(e) ought not be interpreted to reach almost every instance in which § 2113(a) is satisfied.

2. *Section 2113(e) does not punish mere confinement.*

Relatedly, the government's interpretation all but negates Congress's choice in § 2113(e) to require

*accompaniment* rather than merely *confinement* or *restraint*. Nearly every bank robbery involves the restraint of victims (generally customers or tellers) who would otherwise leave and alert the authorities, but the penalty structure of § 2113 suggests that Congress chose *accompaniment* because it wanted to reserve § 2113(e)'s severe penalties for a particularly serious subset of robberies. Yet, under the government's view, just about every form of bank robbery restraint would also qualify as accompaniment, since the robber will typically move some *de minimis* distance with the restrained person (say, a few feet toward the vault with the teller or toward the wall with the customer). If Congress had wanted those scenarios to trigger § 2113(e)'s enhanced penalties, it could have accomplished that result much more naturally by replacing "forces any person to accompany him" with "confines any person" or "restrains any person." But Congress did not adopt those broader formulations, and this Court must give meaning to the words that Congress did use. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) ("Congress' choice of words is presumed to be deliberate.").[8]

Indeed, despite its repeated assertions to the jury in this case, the government has previously acknowledged that § 2113(e) does not cover cases of confinement or restraint. The United States Attorney Manual states that "subsection (e) provides penalties for anyone who

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[8] The Sentencing Guidelines draw a similar distinction between robberies that involve abduction and those that involve only physical restraint. *See* U.S.S.G. § 2B3.1(b)(4).

... *forcibly abducts* another during the commission of any offense previously described in § 2113, or while avoiding or attempting to avoid apprehension." U.S. Dep't of Justice, United States Attorneys' Manual, tit. 9, Criminal Resource Manual § 1349 (2012) (emphasis added). Abduction, by its plain and common meaning, requires substantial movement of a person, not just confinement or restraint. *See, e.g.*, *American Heritage Dictionary* 3 (4th ed. 2000) (defining "abduct" as "to carry off by force."). Accordingly, the manual's characterization of § 2113(e)—while not binding on the Court—provides yet another reason to reject the government's position in this case.

3. *Section 2113(e) originally treated forced accompaniment as a capital crime.*

The history of the federal bank robbery statute further confirms that the government's expansive interpretation cannot be correct. When the statute was enacted, a robber who committed forced accompaniment was subject to the same penalty as one who committed homicide: a mandatory minimum of 10 years, with the possibility of the death penalty. At the time of its enactment, the statute stated:

> Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for

> not less than 10 years, or by death if the verdict of the jury shall so direct.

Act of May 18, 1934, § 3, 48 Stat. 783.

Congress's decision to authorize identical punishments for a bank robbery that involves either a forced accompaniment or a homicide suggests that it viewed the two acts as similarly serious. *See United States v. Williams*, 553 U.S. 285, 294 (2008) (noting the "commonsense canon of *noscitur a sociis* – which counsels that a word is given more precise content by the neighboring words with which it is associated"). It is implausible that Congress would have equated *de minimis* forced movement, such as walking with a person for a few feet, with killing someone.

Moreover, the government's broad interpretation of § 2113 is further undermined by Congress's decision to treat a non-fatal forced accompaniment as a capital crime. In 1934, Congress had authorized the death penalty for only six crimes: (1) treason, 18 U.S.C. § 2; (2) insurrection against certain foreign allies, 22 U.S.C. § 156; (3) espionage in wartime, 50 U.S.C. § 32; (4) first-degree murder, 18 U.S.C. § 454; (5) rape, 18 U.S.C. § 457; and (6) kidnapping, but only when the victim was transported across state lines, held for "an appreciable period against the person's will," *Chatwin v. United States*, 326 U.S. 455, 460 (1946); and was not "liberated unharmed," 18 U.S.C. § 408a (all statutes 1934).

Although a bank robbery that includes *substantial* movement of a victim, such as where the robber takes a hostage out the bank door while fleeing, might be on par with those six offenses, a bank robbery with *de minimis* victim movement is not. Directing a person to

move a few feet during a robbery is a serious offense, but not comparable in seriousness to the other federal capital crimes in 1934. The Court should not adopt a construction of the federal bank robbery statute that imputes to Congress an intent to punish such behavior by death.

To be sure, the penalties for forced accompaniment today differ from those enacted in 1934. In the Federal Death Penalty Act of 1994, Congress eliminated the death penalty for a non-fatal forced accompaniment, but provided that an offense in which "death results shall be punished by death or life imprisonment." Pub. L. No. 103-322, tit. VI, § 60003(a)(9), 108 Stat. 1959, 1969 (1994). Despite changing the applicable penalties, Congress did not change the phrase "forces any person to accompany him without the consent of such person." The meaning of that phrase therefore remains unchanged. *See Hui v. Castaneda*, 559 U.S. 799, 810 (2010) ("[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest" (quotation marks omitted)). Accordingly, the *noscitur a sociis* inference—that Congress viewed forced accompaniment as similarly culpable to homicide—is still valid today.

### C. History and Purpose

The relevant historical background and legislative history also support the conclusion that forced accompaniment requires substantial movement.

To begin, § 2113(e)'s predecessor statute was enacted against the backdrop of a series of bank

robberies in which notorious figures such as John Dillinger and Baby Face Nelson used hostages as human shields as they escaped a bank. For example, less than two weeks before the Senate passed § 2113(e)'s predecessor statute in March 1934, *see* S. Rep. No. 73-537 (1934), Dillinger's gang robbed a bank in Mason City, Iowa, forced as many as 25 hostages to form a human shield outside the bank, and then made nine of them cling to the sides of the getaway car to keep the police from shooting. Bryan Burrough, *Public Enemies: America's Greatest Crime Wave and the Birth of the FBI, 1933-34*, at 253-57 (2004). Several hostages were still on the car's running boards when the police finally gave up their pursuit outside of town. *Id.* at 256-57. Dillinger had employed this tactic repeatedly in the previous year,[9] and other robbers were following suit. *See, e.g., id.* at 108 (in 1933 Michigan robbery, Baby Face Nelson forced hostages to walk in front of him down the sidewalk as he tried to escape); *St. Paul Mob or Dillinger Gang Blamed in Raid*, Mason City Globe-Gazette (Iowa), Mar. 14, 1934, at 1 (comparing the Mason City robbery to several other recent bank robberies: "In each instance, they took hostages with them as shields"). It was surely this type of extreme conduct, and not the prospect of a bank

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[9] In November 1933, Dillinger's gang forced employees and customers to form a human shield as they exited a bank in Wisconsin, made two of them ride out of town on the car's running boards, and then tied them to a tree in the countryside. Burrough, *supra*, at 164-65. In January 1934, the gang used hostages as a shield to escape a bank in Indiana, *id.* at 187, and in March 1934, Dillinger robbed a bank in South Dakota and forced five bank employees to ride on the running boards of his Packard during the escape, *id.* at 245-46.

robber forcing someone to move a few feet inside a building, that motivated Congress's decision to authorize the death penalty for a robber who forces someone to "accompany" him in committing a robbery or while in flight.

Moreover, the legislative history consistently indicates that Congress understood the provision to penalize "kidnapping" in the course of a bank robbery. Both the House and Senate reports referred to § 2113(e) as a kidnapping provision. *See, e.g.*, H.R. Rep. No. 73-1461, at 1 (1934)("kidnapping"); S. Rep. No. 73-537, at 1 (same).[10] And for that matter, this Court has done the same. *United States v. Tateo*, 377 U.S. 463, 464 (1964) (characterizing § 2113(e) as covering "kidnapping in connection with the robbery").

To the extent Congress wanted § 2113(e) to be triggered by conduct on par with kidnapping, that view

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[10] In addition, the note in the margin of the Statutes at Large appearing next to the forced-accompaniment statute is "Homicide or Kidnapping." 48 Stat. 783 (1934). Similarly, the title of the statute that appeared in the 1934 United States Code was "[K]illing or kidnapping as incident to robbery." 12 U.S.C. § 588c (1934). To be sure, Congress did not enact either of those phrases. Rather, the marginal note in the Statutes at Large appears to have been added by the Government Printing Office in the State Department, *see* 64 Stat. 1272 (1950) (noting that before 1950, Secretary of State had been responsible for compiling Statutes at Large), and the title in the United States Code was added by the West Publishing Company and Edward Thompson Company under the direction of the Committee on Revision of the Laws of the House of Representatives. *See* Preface to 1934 United States Code. But these references to kidnapping are evidence of a contemporary understanding that forced accompaniment was analogous to kidnapping.

is irreconcilable with the government's *de minimis* movement interpretation. The federal kidnapping statute, which was enacted only two years before the federal bank robbery statute, clearly required far more than *de minimis* movement, as it applied *only* where the kidnapper crossed state lines with the victim. *See* Act of June 22, 1932, 47 Stat. 326. Similarly, at common law kidnapping required the victim to be transported out of the country. *See* 4 W. Blackstone, Commentaries *219 ("[K]idnapping, being the forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another ... ."); *see also* 3 Wayne R. LaFave, *Substantive Criminal Law* § 18.1(b), at 7 (2d ed. 2003). Dictionaries further confirm that "kidnapping" requires removal of the victim. *Black's Law Dictionary* (3d ed. 1933) ("kidnapping" includes "false imprisonment plus the removal of the person to some other place."); *Webster's New International Dictionary* (2d ed. 1934) (defining "kidnap" as "to carry (anyone) away by unlawful force or by fraud, and against his will, or to seize and detain him for the purpose of so carrying him away").

In sum, the contemporary understanding of kidnapping, along with Congress's repeated references to that term in describing the provision, provides additional evidence that the forced-accompaniment provision is intended to cover conduct that involves a substantial movement of the victim. *See Marx*, 485 F.2d at 1186 (relying on legislative history's references to "kidnapping" to conclude that *de minimis* movement into or inside of a person's own home is not forced accompaniment).

### D. Avoiding Absurd Results

Finally, this Court should reject the government's interpretation because it produces "absurd results" in at least two different ways. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.").

First, the government's interpretation untethers § 2113's graduated penalty scheme from its purpose of providing an increased punishment for increasingly culpable conduct. Although a forced accompaniment carries the most serious penalties (outside of a "killing" offense), much of the conduct covered by the government's broad interpretation—such as walking with a teller toward the vault or with a customer toward an inconspicuous area of the bank—does not increase the offender's culpability in any significant way. It would be absurd, for example, to treat an unarmed robber who orders a teller to walk with him into the vault as more culpable than one who shoots and wounds the teller to prevent her from going anywhere. Yet the government's interpretation would subject the former to § 2113(e)'s severe (and mandatory) penalties while the latter would face only § 2113(d)'s lesser penalties for use of a dangerous weapon.

The Court should reject an interpretation that so clearly divorces the statutory penalties from the

defendant's actual level of culpability. *See Abuelhawa*, 556 U.S. at 821-23 (rejecting interpretation of criminal statute that would "for practical purposes skew the congressional calibration" of penalties by causing "twelve-fold quantum leap in punishment" for offenders who were similarly situated to simple drug possessors); *United States v. Granderson*, 511 U.S. 39, 48 (1994) (adopting interpretation of federal sentencing statute that would "avoid[] the startling disparities in sentencing that would attend the Government's interpretation"); *cf. Carter v. United States*, 530 U.S. 255, 273 (2000) (interpreting provision of § 2113 based on its "'steeply higher penalties' – an enhancement from a 1-year to a 10-year maximum penalty").

Second, the government's interpretation makes the applicability of § 2113(e) turn on a factual distinction largely irrelevant to culpability: whether the victim's movement occurs roughly in concert with the robber's own movement. For example, imagine a robber who commands a bank customer to walk to the back of the bank where she will not be seen. If the robber stands still while the customer follows his command, there is no forced accompaniment. But if the robber takes a few steps in the same direction, then a forced accompaniment has occurred. The same would be true for a robber who orders the teller to retrieve money from the vault: if he stands still, there is no forced accompaniment; but if he follows for a few steps, it becomes a forced accompaniment. Congress could not have intended for § 2113(e)'s severe penalties to turn on that distinction.

The drafters of the Model Penal Code (1980) ("M.P.C.") notably recognized a similar "absurdity"

problem in defining the asportation element of kidnapping. The Code's drafters observed that the definition needed to "eliminate[] the *absurdity* of liability for kidnapping where a robber forces his victim into his own home or into the back of a store in order to retrieve valuables located there." M.P.C. § 212.1, cmt. 3, at 223 (emphasis added). To do so, the Code defines kidnapping to apply when a person "unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found." M.P.C. § 212.1.[11]

The absurdities of the government's expansive interpretation are illustrated well by the facts of this case. First, if Whitfield had carried a gun into Mrs. Parnell's home and fired a non-fatal shot when he first encountered her, he would have been guilty of a § 2113(d) offense—with no mandatory minimum and a maximum of 25 years. Whitfield in fact did not carry or use a weapon at all inside the house, but because he asked Mrs. Parnell to hide in the computer room, and then joined her there, the government says he is guilty of a § 2113(e) offense—with a 10-year mandatory minimum and a maximum of life. Second, if Whitfield had ordered Mrs. Parnell to go into the computer room

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[11] The Code alternatively defines kidnapping as "unlawfully confining another for a substantial period in a place of isolation." That alternative definition is not relevant to § 2113(e) because, as explained above, the text and structure of that provision show that it is not violated by mere confinement. In any event, the point here is not that Congress intended to adopt the Code's definition: it surely did not, as the Code post-dates the statute's enactment by several decades. Rather, the point is that like the Code, § 2113(e) should be interpreted to avoid the absurd results that flow from the government's broad interpretation.

but had himself remained in the hallway, there would have been no forced accompaniment. But, because Whitfield acknowledged that he took "a couple steps" into the room before going back out to get a phone, the government says he committed a forced accompaniment that subjects him to § 2113(e)'s severely enhanced penalties.

Construing § 2113(e) to require substantial movement properly avoids these absurd results. The provision's enhanced penalties should not turn on the vagaries of whether a defendant takes a few steps with his victim in the process of committing a crime. Rather, they should be reserved for cases where substantial movement is at issue, such as where the robber takes a hostage with him as he flees from the bank.

## II. The Rule Of Lenity Requires This Court To Adopt The Narrower Construction Of § 2113(e)

After applying the tools of statutory construction, this Court should conclude that a forced-accompaniment offense under § 2113(e) requires substantial movement of the victim. *See supra* Section I. Alternatively, the Court should conclude at the very least that the provision does not unambiguously cover offenses that involve only *de minimis* victim movement. *See DePierre v. United States*, 131 S. Ct. 2225, 2237 (2011) (noting that rule of lenity is reserved for cases where ambiguity remains even "after seizing everything from which aid can be derived" (quotation marks omitted)); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of

statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

If the Court determines that the statute is ambiguous as to whether substantial movement or merely *de minimis* movement is required, then the rule of lenity dictates that the Court adopt the narrower construction. *See Granderson*, 511 U.S. at 54 ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). Stated another way, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court may] choose the harsher only when Congress has spoken in clear and definitive language." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)). As shown above in Section I, it is certainly (more than) rational to read § 2113(e) as requiring substantial movement. And there is no doubt that the government's broad interpretation is the "harsher" alternative.

## III. Whitfield's Conviction Must Be Reversed Under A Substantial Movement Standard

Under the correct legal standard, Whitfield's § 2113(e) conviction must be reversed because no reasonable jury could have found that the forced movement at issue here was substantial. Even viewed in the light most favorable to the government, the evidence showed that Mrs. Parnell was forced to move only a few feet from one room to another inside of her

own home. JA 65a (court of appeals acknowledgement that "Whitfield required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period").

That forced movement was a far cry from cases in which robbers abduct bank customers and force them into their getaway cars. It was, instead, equivalent to the *de minimis* forced movement that routinely occurs when a robber temporarily confines bank employees and customers during a robbery. That type of insubstantial movement over a few feet—movement that is essentially unavoidable whenever a victim is confined during a robbery—is not forced accompaniment. Accordingly, the Court should hold that there was insufficient evidence to convict Whitfield of forced accompaniment under § 2113(e).

## CONCLUSION

For the foregoing reasons, the Court should reverse Whitfield's § 2113(e) conviction and remand for resentencing on the remaining counts.

August 22, 2014

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# STATUTORY ADDENDUM

## 18 U.S.C. § 2113

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny–

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal Credit Union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means--

(1) a Federal savings association or State savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.

# RESPONDENT'S BRIEF

No. 13-9026

# In the Supreme Court of the United States

LARRY WHITFIELD, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES


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## QUESTION PRESENTED

While fleeing from police after an aborted bank robbery, petitioner invaded an elderly woman's home, forced her to go with him to a room where they could not be seen by officers searching the neighborhood, and required her to remain there until she had a heart attack and stopped breathing. The question presented is whether a reasonable jury could have found that petitioner's conduct violated 18 U.S.C. 2113(e), which makes it a crime for a bank robber to "force[] any person to accompany him without the consent of such person" in "attempting to avoid apprehension for the commission" of a bank robbery or attempted bank robbery.

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# In the Supreme Court of the United States

No. 13-9026

LARRY WHITFIELD, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (J.A. 18a-22a) is not published in the *Federal Reporter*, but is reprinted in 548 Fed. Appx. 70. An earlier opinion of the court of appeals (J.A. 24a-66a) is reported at 695 F.3d 288.

### JURISDICTION

The judgment of the court of appeals (J.A. 23a) was entered on December 10, 2013. The petition for a writ of certiorari was filed on March 7, 2014, and was granted on June 23, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the appendix to this brief. App., *infra*, at 1a-5a.

## STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of attempted bank robbery, in violation of 18 U.S.C. 2113(a) (Count 1); conspiring to carry a firearm during an attempted bank robbery, in violation of 18 U.S.C. 924(*o*) (Count 2); carrying a firearm during and in relation to an attempted bank robbery, in violation of 18 U.S.C. 924(c) (Count 3); and forceful accompaniment resulting in death while attempting to avoid apprehension for an attempted bank robbery, in violation of 18 U.S.C. 2113(e) (Count 4). He was sentenced to life imprisonment on Count 4, concurrent terms of 240 months of imprisonment on Counts 1 and 2, and a consecutive term of 60 months of imprisonment on Count 3. The court of appeals affirmed in part, vacated in part, and remanded for resentencing. J.A. 24a-66a. This Court denied a petition for a writ of certiorari. 133 S. Ct. 1461 (2013).

On remand, the district court resentenced petitioner to 264 months of imprisonment on Count 4 and left the rest of his sentence unchanged. J.A. 70a. The court of appeals affirmed. *Id.* at 18a-22a.

1. Section 2113 of Title 18 prohibits a variety of offenses against banks and other financial institutions and prescribes a range of sentences that escalate with the gravity of the offense. Section 2113(b) provides that bank larceny is punishable by up to one year of imprisonment, or up to ten years if more than $1000 is stolen. See *Carter* v. *United States*, 530 U.S. 255, 262-263 (2000). Section 2113(c) imposes the same punishment on anyone who knowingly receives the proceeds of a violation of Section 2113(b). *Id.* at 263. Section 2113(a) establishes greater punishments for bank

robbery, providing a sentence of up to 20 years of imprisonment for anyone who "takes, or attempts to take," bank property "by force and violence, or by intimidation." 18 U.S.C. 2113(a). Section 2113(a) also provides the same penalty for extortion and for entering or attempting to enter a bank with intent to commit a felony inside.

Subsections (d) and (e) define "aggravated form[s] of [bank] robbery." *Jones* v. *United States*, 526 U.S. 227, 236 (1999). Section 2113(d) increases the maximum punishment to 25 years of imprisonment if a person, "in committing, or in attempting to commit, any offense defined in subsections (a) and (b)" uses a dangerous weapon to "assault[] any person" or to "put[] in jeopardy the life of any person." 18 U.S.C. 2113(d); see *Simpson* v. *United States*, 435 U.S. 10, 11 n.6 (1978). Section 2113(e) applies to anyone who, "in committing any offense defined in [Section 2113], or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person." 18 U.S.C. 2113(e). A violation of Section 2113(e) that does not result in death carries a minimum sentence of ten years of imprisonment and an implied maximum of life. See *United States* v. *Turner*, 389 F.3d 111, 120-121 (4th Cir. 2004), cert. denied, 544 U.S. 935 (2005). If death results from the crime, Section 2113(e) requires a sentence of "death or life imprisonment." 18 U.S.C. 2113(e).[1]

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[1] Under 18 U.S.C. 3559(c), certain recidivist offenders are subject to a mandatory sentence of life in prison for any bank robbery

2. On September 26, 2008, petitioner and Quanterrious McCoy attempted to rob the Fort Financial Credit Union in Gastonia, North Carolina. J.A. 25a. The two men drove to the credit union armed with a .357 magnum handgun and an assault rifle. *Ibid.* When they passed through the credit union's exterior doors, their weapons set off a metal detector and an automatic lock prevented them from opening the inner doors to the lobby. *Ibid.* Petitioner shook the inner doors in an attempt to gain entry, but the lock held and the robbery was thwarted. *Ibid.*

Petitioner and McCoy fled in their car, pursued by police who had been alerted to the attempted robbery by credit union employees. J.A. 26a. After a brief chase reaching speeds approaching 100 miles per hour, their getaway car collided with another vehicle, slid off the highway, and became stuck in a dirt median. *Ibid.*; C.A. App. 357-358, 378-379. Petitioner and McCoy fled on foot into a wooded neighborhood, splitting up and discarding their guns. J.A. 26a.

Police officers began to search the neighborhood. They soon found and arrested McCoy, but petitioner evaded capture for several hours by hiding in two houses. J.A. 26a-28a. He first kicked in the door to a home owned by Tina Walden. *Id.* at 26a. When Walden returned from work, petitioner met her at the door, brandished a knife, and instructed Walden to "shut up and come in." *Id.* at 26a. (citation omitted). Walden instead turned and ran, and petitioner fled as well, discarding the knife along the way. *Ibid.*

Petitioner next went to the home of Herman and Mary Parnell, entering through the unlocked front

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involving death, serious bodily injury, a dangerous weapon, or a threat of a dangerous weapon.

door. J.A. 26a. "As soon as [he] walked through [the door to] the house," he encountered Mrs. Parnell, who was 79 years old and home by herself. *Id.* at 128a; see *id.* at 26a, 112a, 154a. Mrs. Parnell "immediately became very upset and began to cry." *Id.* at 26a-27a. Stating that he "needed a place to hide," *id.* at 128a, 165a, petitioner "directed" Mrs. Parnell to go with him from the living room to a computer room down the hall, "where they could not be seen by the police" searching the neighborhood, *id.* at 65a. The door to the computer room was approximately nine feet down a hallway from the living room, a total of roughly 20 feet from the front door. *Id.* at 176a.

Mrs. Parnell told petitioner that he "need[ed] to leave," J.A. 159a, but petitioner refused to go and "required Mrs. Parnell to stay in the computer room," *id.* at 65a. Petitioner then attempted to arrange his escape from the area, texting and calling his friend Tamecia Sanders for a ride. *Id.* at 27a. Sanders spoke with petitioner several times as she drove to pick him up, and phone records show that petitioner was in the Parnell home for more than an hour. C.A. App. 770-771. Sanders also spoke directly to Mrs. Parnell, who provided her with driving directions. J.A. 27a. But Sanders was unable to get to the Parnell residence because police officers had blocked off the street. *Id.* at 102a-103a. Other officers continued to search the neighborhood, and at times petitioner could see them in the Parnells' backyard. *Id.* at 159a, 161a.

After she encountered the police roadblock, Sanders, who was still on the phone with petitioner, heard Mrs. Parnell say that she was having trouble breathing. J.A. 103a. Sanders advised petitioner to step out of the room to "give [Mrs. Parnell] a minute" and to

call an ambulance. *Id.* at 27a (brackets in original; citation omitted). Petitioner left Mrs. Parnell in the computer room, but did not call an ambulance. *Ibid.* Shortly thereafter, petitioner told Sanders that Mrs. Parnell had stopped breathing, that she "appeared to be unconscious," and that she "may have died," but he still did not attempt to summon help. *Ibid.*

Some time later, petitioner ended his call with Sanders and fled from the home when a neighbor knocked on the front door to check on Mrs. Parnell. J.A. 27a-28a. Petitioner was eventually discovered hiding in the nearby woods and arrested. *Id.* at 28a. In the meantime, Mr. Parnell returned home to find his wife motionless in a chair in the computer room. *Ibid.* He attempted CPR and called 911, but Mrs. Parnell was never revived, having suffered a fatal heart attack. *Ibid.*

2. A federal grand jury returned an indictment charging petitioner and McCoy with attempted bank robbery, in violation of 18 U.S.C. 2113(a) (Count 1); conspiring to carry a firearm during an attempted bank robbery, in violation of 18 U.S.C. 924(*o*) (Count 2); and carrying a firearm during and in relation to an attempted bank robbery, in violation of 18 U.S.C. 924(c) (Count 3). Petitioner was also charged with "forc[ing Mrs. Parnell] to accompany him without her consent, and kill[ing] [her]" while attempting to avoid apprehension for the attempted bank robbery, in violation of 18 U.S.C. 2113(e) (Count 4). J.A. 75a-79a.

a. The evidence at trial included statements petitioner made to police following his arrest. Petitioner admitted that he had entered the Parnell home, but he initially denied speaking with Mrs. Parnell and signed

a written statement falsely asserting that she had been "asleep" in the computer room the entire time he had been in the house. J.A. 126a-127a; see *id.* at 148a. In response to further questioning, petitioner admitted that he had encountered Mrs. Parnell "as soon as" he entered the home and that he had "asked her to go into the computer room" or "guided" her there. *Id.* at 65a, 128a, 155a-156a. But he still attempted to minimize his culpability, falsely maintaining that he had left Mrs. Parnell alone after directing her into the computer room, that she had been "sleeping" when he left the house, and that he could "hear her breathing" while she slept. *Id.* at 128a; see *id.* at 157a-163a.

b. After the close of the government's case, petitioner moved for a judgment of acquittal on Count 4. He argued, among other things, that the evidence was insufficient to prove that he had "forced Mrs. Parnell to accompany him anywhere." J.A. 40a (citation omitted). The district court denied the motion, and also denied petitioner's renewed motion after the close of all of the evidence. *Ibid.*

The district court instructed the jury that, to find petitioner guilty on Count 4, it had to find that he committed the attempted bank robbery alleged in Count 1 and that, in attempting to avoid apprehension for that offense, he either killed Mrs. Parnell or forced her to accompany him without her consent. J.A. 115a. The court then instructed the jury that if it found that petitioner "forced [Mrs.] Parnell to accompany him," it should decide "whether that forced accompaniment resulted in [her] death." *Ibid.* The court further instructed, without objection by petitioner, that "the term 'forced accompaniment' includes[] forcing a person to move from one part of a building to another

against her will" and that the government is not required to prove "that the defendant crossed a property line, moved a person a particular number of feet, held the person for a particular period of time, or placed the person at a certain level of danger." *Id.* at 116a; see C.A. App. 931-939.

c. The jury found petitioner guilty on all counts. J.A. 118a-120a. On Count 4, the jury found that petitioner did not kill Mrs. Parnell, but that he forced her to accompany him and that the forced accompaniment resulted in Mrs. Parnell's death. *Id.* at 119a. The district court sentenced petitioner to life in prison on Count 4, as Section 2113(e) requires for a violation resulting in death where capital charges are not brought. *Id.* at 43a & n.7. The court also sentenced petitioner to two terms of 240 months of imprisonment on Counts 1 and 2, to be served concurrently with each other and with the sentence on Count 4, and to a consecutive term of 60 months of imprisonment on Count 3. *Id.* at 43a.

3. The court of appeals affirmed in part, vacated in part, and remanded for resentencing on Count 4. J.A. 18a-66a.

a. As relevant here, the court of appeals rejected petitioner's contention that the evidence was insufficient to allow the jury to find that he violated Section 2113(e) by forcing Mrs. Parnell to accompany him. J.A. 64a-65a.[2] Petitioner principally argued that "the

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[2] Petitioner states (Br. 9-10) that he argued on appeal that the jury instructions "defined forced accompaniment too broadly," but he did not challenge the instruction on the degree of movement required by Section 2113(e). Instead, he argued only that other portions of the instructions constituted plain error because they allowed jury to convict based on a finding of mere confinement

prosecution failed to produce any evidence that he had threatened Mrs. Parnell" because he had merely "guided" or "asked" her to go into the computer room. *Id.* at 65a. The court was "entirely unpersuaded" by that argument, "declin[ing] to accept that an ostensible 'request' by a physically agile twenty-year-old male attempting to evade apprehension for an attempted bank robbery constitutes anything less than a real threat, particularly when aimed at a fragile seventy-nine-year-old woman during a terrifying invasion of her home." *Ibid.* The court explained that "there was ample evidence that [petitioner] wanted to position Mrs. Parnell in the computer room where they could not be seen by the police"; that petitioner had "admitted that he directed Mrs. Parnell to the computer room"; and that "when she attempted to defy his instructions by insisting that he leave the home, [petitioner] required Mrs. Parnell to stay in the computer room." *Ibid.*

The court of appeals acknowledged that petitioner "required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period," but concluded that "no more is required to prove that a forced accompaniment occurred." J.A. 65a. The court relied on circuit precedent holding that "[b]y its plain terms, [Section 2113(e)] reaches a defendant who forces any person to accompany him" and contains "no requirement that the government prove that the defendant crossed a property line" or "traverse[d] a particular number of feet." *Turner*, 389 F.3d at 119-120 (citation omitted); see J.A. 65a.

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rather than forced accompaniment—an argument that the court of appeals rejected and that petitioner does not renew here. J.A. 53a-55a; see Pet. C.A. Br. 42-43.

b. Although it upheld petitioner's conviction for forcing Mrs. Parnell to accompany him, the court of appeals held that he was improperly convicted of an additional offense not charged in the indictment—a forced accompaniment resulting in death. J.A. 55a-64a. The court explained that, in its view, Section 2113(e) defines three crimes: a killing offense, a forced-accompaniment offense, and a forced accompaniment resulting in death offense. *Id.* at 28a-30a, 57a-58a. The court concluded that the indictment charged only the killing and forced-accompaniment offenses and that the district court constructively amended the indictment by instructing the jury on the death-results offense as well. *Id.* at 56a-62a. The court therefore vacated petitioner's conviction on the death-results offense and remanded with instructions "to amend the judgment to reflect [his] conviction on the forced accompaniment offense" and to "resentence him accordingly." *Id.* at 63a-64a.

3. Petitioner sought a writ of certiorari, and this Court denied the petition. 133 S. Ct. 1461 (2013).

4. Meanwhile, on remand, the district court determined that petitioner's advisory Guidelines range for the forced-accompaniment offense was governed by Sentencing Guidelines § 2B3.1(c)(1), which provides that if a robbery results in a death, the offense level is determined under Section 2A1.1, the first-degree murder Guideline. C.A. Supp. App. 67-70; see Sentencing Guidelines §§ 2A1.1, comment. (n.1), 2B3.1(c)(1) (2009). The court found that the first-degree murder Guideline applied because it was "clear" from the medical testimony and other evidence at trial "that Mrs. Parnell's death was caused by [petitioner's] conduct." C.A. Supp. App. 67-68. Sec-

tion 2A1.1 provides for an offense level of 43, but the court departed downward by five levels because petitioner did not intentionally or knowingly cause Mrs. Parnell's death. *Id.* at 86; see Sentencing Guidelines § 2A1.1, comment. (n.2(B)) (2009). The resulting advisory Guidelines range was 235 to 293 months of imprisonment. *Id.* Ch. 5, Pt. A.

The district court resentenced petitioner to 264 months of imprisonment, the middle of the applicable Guidelines range. J.A. 19a; see C.A. Supp. App. 86. The court emphasized the "egregious nature" of petitioner's conduct, noting that in addition to attempting an armed bank robbery, he "let Mrs. Parnell die" by "ignor[ing]" opportunities to summon help when the stress associated with his invasion of her home caused her to have a heart attack. J.A. 122a, 124a. The court left the remainder of petitioner's sentence unchanged, which yielded an aggregate sentence of 324 months of imprisonment: concurrent terms of 240, 240, and 264 months on Counts 1, 2, and 4, and a consecutive term of 60 months on Count 3. C.A. Supp. App. 91.

5. The court of appeals affirmed in an unpublished per curiam decision rejecting petitioner's challenges to his revised sentence. J.A. 18a-22a.

## SUMMARY OF ARGUMENT

Section 2113(e) of Title 18 prescribes greater penalties for a bank robber who, "in avoiding or attempting to avoid apprehension for the commission of" an offense under Section 2113, "forces any person to accompany him without the consent of such person." Petitioner violated that statute when he invaded the Parnell home and directed Mrs. Parnell to go with him to a room where they could not be seen by the police. He does not dispute that he was "attempting to avoid

apprehension for the commission" of an attempted bank robbery that violated Section 2113(a). He also no longer challenges the jury's finding that he "force[d]" Mrs. Parnell to go with him without her consent. He contends only that no reasonable jury could have found that he forced Mrs. Parnell to "accompany" him because, in his view (Br. 12), a forced accompaniment occurs only when "a defendant forces a victim to travel with him for a *substantial* distance, such as when a robber takes a hostage out of the bank." The court of appeals correctly held that Section 2113(e) contains no such limitation.

A. The text of Section 2113(e) provides no support for petitioner's substantial-distance requirement. The word "accompany" typically connotes joint movement, but it does not require travel over any particular distance and readily encompasses movement from one room to another. In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), for example, this Court wrote that police officers found a suspect in his bedroom and "asked him to get dressed and to accompany them into the living room." *Id.* at 300. Dictionary definitions and many other examples confirm that the Court's usage of the word was both proper and common.

B. The natural interpretation of Section 2113(e)'s text is consistent with the statutory context and structure. To be forced to accompany a bank robber is a terrifying experience for the victim and increases the risk of death or injury even if the forced accompaniment occurs entirely inside a bank or other building. Robberies involving such conduct are properly subject to Section 2113(e)'s increased penalties.

Petitioner asserts (Br. 3, 23) that the court of appeals' reading would make "virtually every bank rob-

bery" subject to Section 2113(e) because robbers "almost invariably exert some control over the movement of the bank's employees" and customers. That is incorrect both legally and factually. Because Section 2113(e) covers only forced *accompaniment*, it does not reach a robber who directs employees and customers to move around the bank without accompanying them. And because most bank robberies are accomplished through means that do not involve any forced movement at all—such as the presentation of a demand note to a teller—giving forced accompaniment its natural scope will not transform the typical bank robbery into an aggravated offense.

Petitioner also errs in contending (Br. 25-27) that Section 2113(e)'s text should be artificially narrowed because the forced-accompaniment offense previously carried a potential sentence of death. When the statute was enacted in 1934, Congress reasonably concluded that the heightened dangers to innocent victims and the need for deterrence could warrant the ultimate punishment for the most extreme forms of the offense. But in 1994, following changes in this Court's capital-punishment jurisprudence, Congress amended the statute to eliminate the possibility of a capital sentence for a violation of Section 2113(e) not resulting in death. The context and structure of the current statute provide no reason to depart from Section 2113(e)'s natural meaning.

C. The court of appeals' approach is also consistent with Section 2113(e)'s limited legislative history. Petitioner relies on committee reports referring to Section 2113(e)'s predecessor as prohibiting "kidnapping" in the course of a bank robbery. Congress did not, however, incorporate the elements of kidnapping

into the statute. In any event, when Section 2113(e)'s predecessor was enacted in 1934, kidnapping was not understood to require that the victim be moved any particular distance.

D. The court of appeals' interpretation of Section 2113(e) does not yield absurd results. Congress reasonably concluded that a robber who forces one or more victims to accompany him is more culpable than an offender who commits an unaggravated robbery violating Section 2113(a) or a simple armed robbery violating Section 2113(d). Moreover, the Sentencing Guidelines and the discretion of sentencing judges ensure that a robber who shoots a victim or engages in similar aggravating conduct without violating Section 2113(e) will receive a higher sentence than an unarmed robber who merely forces a victim to accompany him for a short distance. Petitioner has therefore identified no anomalous results—much less the sort of absurdity that would warrant a departure from the statutory text.

E. Petitioner, his amici, and the handful of lower-court judges that have endorsed departures from Section 2113(e)'s text have advocated a variety of conflicting approaches, all of which lack merit. Petitioner's proposal that a victim must be transported a "substantial" distance is vague and unworkable. A requirement that the victim travel a particular number of feet or move into or out of a building would be arbitrary. And an approach based on the law of kidnapping would be both legally unsound and a source of confusion. Some state courts have held that moving or confining a victim will not support a separate conviction for kidnapping if it is "incidental" to another offense, such as a robbery or rape. But those courts

have struggled to develop and apply a consistent approach. And the concerns motivating their efforts do not apply to Section 2113(e), which does not define a separate crime of kidnapping but rather specifies that a bank robbery involving forced accompaniment is an aggravated offense warranting increased penalties.

F. Finally, petitioner's reliance on the rule of lenity is misplaced. The rule applies only where a statute contains a grievous ambiguity. It has no role to play where, as here, the text, structure, and other indicators of a statute's meaning leave no doubt that it covers the conduct at issue.

## ARGUMENT

### PETITIONER WAS PROPERLY CONVICTED OF VIOLATING 18 U.S.C. 2113(e) BY FORCING ANOTHER PERSON TO ACCOMPANY HIM IN ATTEMPTING TO AVOID APPREHENSION FOR AN ATTEMPTED BANK ROBBERY

#### A. The Text Of Section 2113(e) Unambiguously Covers Petitioner's Conduct

1. As petitioner acknowledges (Br. 15), the interpretation of Section 2113(e) must begin "with the language of the statute itself," *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989), construed "in accord with its ordinary or natural meaning," *Smith* v. *United States*, 508 U.S. 223, 228 (1993). The language in Section 2113(e) making it a crime for a bank robber to "force[] any person to accompany him" was first enacted in 1934. Act of May 18, 1934, ch. 304, § 3, 48 Stat. 783 (App., *infra*, at 4a-5a). Then as now, to "accompany" another person meant "[t]o go with or attend as a companion or associate" or "to go along with." *Webster's New International Dictionary of the*

*English Language* 16 (2d ed. 1934) (*Webster's Second*); see *Funk & Wagnall's New Standard Dictionary of the English Language* 20 (1946) (*Funk & Wagnall's*) ("To go with, or be associated with, as a companion, an attendant, or a retinue; escort or convoy."); cf. *Webster's Third New International Dictionary of the English Language* 12 (1993) ("to go with or attend as an associate or companion" or "go along with").

Inserting that definition into Section 2113(e) demonstrates that the statute applies to anyone who, "in avoiding or attempting to avoid apprehension for the commission of" an offense under Section 2113, "forces any person to [go with him as a companion or associate] without the consent of such person." Petitioner's conduct falls squarely within that description: He forced Mrs. Parnell to go with him from her living room to her computer room without her consent, J.A. 65a, and he did so in "attempting to avoid apprehension" for an attempted bank robbery—indeed, "[petitioner] wanted to position Mrs. Parnell in the computer room where they could not be seen by the police" searching the neighborhood. *Ibid.*

2. Petitioner previously took the position that the word "accompany" was "silent as to the amount of 'movement or travel' required." Pet. 17 (citation omitted). Changing course, he now maintains (Br. 16) that the ordinary meaning of "accompany" requires "substantial movement" and that it would be "awkward" or "uncommon" to use it to describe movement over a shorter distance or between rooms in a home. It is of course true that one can accompany another person on a long trip. But it is equally proper—and entirely commonplace—to say that a person accompanies someone from one room to another. In *Oregon* v.

*Elstad*, 470 U.S. 298 (1985), this Court wrote that police officers found a suspect in his bedroom and "asked him to get dressed and to accompany them into the living room." *Id.* at 300. In *Washington* v. *Chrisman*, 455 U.S. 1 (1982), the Court explained that a police officer "accompan[ied]" a college student "from the public corridor of the dormitory into his room." *Id.* at 6. Other examples abound.[3] Nor is that usage a recent innovation. In *Breese* v. *United States*, 226 U.S. 1 (1912), Justice Holmes, writing for the Court, stated that the members of a grand jury "did not accompany" the foreman when he brought an indictment to the court from "a room adjoining the court room." *Id.* at 7.

This Court's repeated use of "accompany" to refer to joint movement from one room to another is neither

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[3] See, *e.g.*, *Georgia* v. *Randolph*, 547 U.S. 103, 147 (2006) (Thomas, J., dissenting) ("The police accompanied Mrs. Coolidge [from the front door of her home] to the bedroom."); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 650 (1995) (describing a procedure in which an adult monitor "accompan[ies]" a student into a locker room for drug testing); *Moran* v. *Burbine*, 475 U.S. 412, 448 (Stevens, J., dissenting) ("[Two police officers] accompanied [a third officer] 'back into [an adjacent] room.'"); *Florida* v. *Royer*, 460 U.S. 491, 494 (1983) (plurality opinion) ("[Detectives] asked Royer to accompany them to a room, approximately 40 feet away, adjacent to the [airport] concourse."); *United States* v. *Mendenhall*, 446 U.S. 544, 548 (1980) ("Agent Anderson asked the respondent if she would accompany him to the airport DEA office * * *, which was located up one flight of stairs about 50 feet from where the respondent had first been approached."); *Moore* v. *Illinois*, 408 U.S. 786, 793 (1972) (police officers "accompanied [a witness] into the courtroom"); see also *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2528 (2014) (explaining that escorts "greet women as they approach [a] clinic, accompanying them through [35-foot buffer] zones to the clinic entrance").

awkward nor idiosyncratic. "The greatest of writers have used the word with this meaning," *Muscarello* v. *United States*, 524 U.S. 125, 129 (1998), describing one person "accompan[ying]" another person "into [a] room," Charles Dickens, *David Copperfield* 570 (Vintage Books 2008) (1850); "out of [a] room," Jane Austen, *Pride & Prejudice* 143 (Penguin Books 2003) (1813); "to the door," Willa Cather, *One of Ours* 260 (Alfred A. Knopf, Inc. 1922); "upstairs," *id.* at 108; William Makepeace Thackeray, *Vanity Fair* 264 (Penguin Books 2001) (1848); and "toward" a person from across the room at a party, Henry James, *The Portrait of a Lady* 410 (Alfred A. Knopf, Inc. 1991) (1881).

Consider also some recent examples from the *New York Times*, which demonstrate that a person can "accompan[y]" another person "across [a] locker room,"[4] "to [a] seat[]" in a theater,[5] "to the stage" at an awards ceremony,[6] "to the altar" at a wedding,[7] "to [a] room" from a hotel hallway,[8] or "to [a patient's] room" in a hospital.[9] Again, this usage is not novel. In

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[4] Dave Anderson, *Chrebet Has His Legacy. He Should Take It Home*, N.Y. Times, Nov. 7, 2005, at D5.

[5] Joe Rogers, *Metropolitan Diary*, N.Y. Times, Jan. 10, 2005, at B2.

[6] Manohla Dargis, *'Amour,' a Wrenching Love Story, Wins at Cannes*, N.Y. Times, May 28, 2012, at C1.

[7] Elisabetta Povoledo, *Same-Sex Couple Say, 'I Do,' as Italy Sticks to 'I Don't,'* N.Y. Times, May 28, 2013, at A7.

[8] William Neuman & Michael S. Schmidt, *Woman Recounts Quarrel Leading to Agent Scandal*, N.Y. Times, Apr. 19, 2012, at A1.

[9] Nell Burger Kirst, *Medical Care That Transcends Words*, N.Y. Times, Jan. 5, 2010, at D5.

an example of particular relevance here, a 1930 article reported that a robber "accompanied [a bank employee] into the vault" during a robbery. *Bank Bandits Get $59,616 in Chicago*, N.Y. Times, Dec. 7, 1930, at 26.[10]

3. These numerous counterexamples refute petitioner's contention that the ordinary meaning of "accompany" requires travel over a substantial distance. Petitioner's arguments are also unpersuasive on their own terms.

First, petitioner notes (Br. 16) that contemporary dictionaries defined "accompany" in part as to "escort," *Funk & Wagnall's* 20, or to go with as "an attendant" or "a companion," *ibid.*; see *Webster's Second* 16. Petitioner asserts (Br. 17) that those terms "typically" imply substantial movement. But he provides no support for that assertion, and it is incorrect. One can "escort" a person for a short distance, such as from a dentist's office "back to the waiting room," *Francis* v. *Franklin*, 471 U.S. 307, 310 (1985), or from a courtroom "to the jury room," *Gonzales* v. *Beto*, 405 U.S. 1052, 1059 (1972) (Rehnquist, J., dissenting). And "attendant" and "companion" are broad terms that do not necessarily signify movement at all, let

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[10] See also, *e.g.*, J.D. Phillips, *New Cabinet Takes Control in Havana; Labor Ends Strike*, N.Y. Times, Aug. 15, 1933, at 1 (aides "accompanied" the new Cuban president "out on a second floor balcony"); *Boy Hero Receives Run of White House*, N.Y. Times, Apr. 30, 1931, at 3 (a guide "accompanied" a White House guest from one room to another); *13 Insane Convicts Escape in Michigan*, N.Y. Times, June 4, 1930, at 14 (inmates "forced [guards] to accompany them" from an upper floor of a prison hospital "to the first floor"); *Snook Goes to Chair for Slaying Girl*, N.Y. Times, Mar. 1, 1930, at 18 (guards "accompanied" prisoner into execution chamber).

alone require travel for a substantial distance. See *Webster's Second* 178 (an "attendant" is "[o]ne who attends or accompanies in any character whatever"); *id.* at 542 (a "companion" is "[o]ne who accompanies or is in company with another for a longer or shorter period").

Second, petitioner contends (Br. 18-19) that all of the uses of "accompany" in the 1934 edition of the United States Code "refer to substantial movement," typically international or interstate travel. But that observation merely reflects the subjects addressed by federal statutes at the time—it scarcely demonstrates that the contemporary meaning of "accompany" was *limited* to long-distance travel. Petitioner does not, for example, suggest that Congress used some other term to describe joint movement over shorter distances, such as between rooms. Petitioner's argument based on contemporary statutes also proves too much. If the meaning of "accompany" were restricted to travel of the sort addressed in the 1934 Code provisions he cites, Section 2113(e) would not apply to a robber who took a hostage out of the bank and released her several blocks or even several miles away, because no 1934 provision addressed movement over such a relatively short distance.

4. As numerous courts of appeals have recognized, therefore, Section 2113(e), by its "plain terms," does not require "'that the defendant cross[] a property line,'" "'that the [hostage] traverse a particular number of feet, that the [hostage] be held against [her] will for a particular time period, or that the [hostage] be placed in a certain quantum of danger.'" *United States* v. *Turner*, 389 F.3d 111, 119-120 (4th Cir. 2004) (quoting *United States* v. *Bauer*, 956 F.2d 239, 241

(11th Cir.) (per curiam), cert. denied, 506 U.S. 976 (1992)), cert. denied, 544 U.S. 935 (2005). "[T]he statute plainly, and only, requires accompaniment that is forced and without consent"; it does not include any "qualifying language" justifying an analysis of the "substantiality" of the forced accompaniment. *United States* v. *Strobehn*, 421 F.3d 1017, 1019 (9th Cir. 2005), cert. denied, 547 U.S. 1005 (2006). "The statute simply requires what it says: forced accompaniment without consent. It is an apt description for what [petitioner] compelled [Mrs. Parnell] to do." *United States* v. *Davis*, 48 F.3d 277, 279 (7th Cir. 1995).

Petitioner effectively seeks to insert words into the statute by reading Section 2113(e) to apply only when a bank robber "forces any other person to accompany him *for a substantial distance*." But this Court has repeatedly declined to "read[] words or elements into a statute that do not appear on its face," *Bates* v. *United States*, 522 U.S. 23, 29 (1997); see also, *e.g.*, *Brogan* v. *United States*, 522 U.S. 398, 406, 412 (1998); *United States* v. *Wells*, 519 U.S. 482, 490-493 (1997). The court of appeals thus correctly rejected petitioner's attempt to "engraft onto [Section] 2113(e) an element that Congress did not see fit to include." *Turner*, 389 F.3d at 119.

### B. Statutory Context And Structure Reinforce The Natural Reading Of Section 2113(e)'s Text

The words of a statute must, of course, "be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). But the structure of Section 2113 and the relevant statutory context further confirm that Section 2113(e) should be construed according to its plain terms.

1. As petitioner observes (Br. 21), Section 2113's structure suggests that Congress intended to authorize escalating penalties for increasingly serious offenses, and that it prescribed greater minimum and maximum sentences for violations of Section 2113(e) because it viewed a crime involving forced accompaniments as potentially more serious than a robbery covered by Section 2113(a) or a robbery involving a dangerous weapon punishable under Section 2113(d). Nothing in that structure suggests, let alone requires, a departure from Section 2113(e)'s text.

In some cases, violations of Section 2113(e) involve robbers who take hostages with them as they flee from the bank. See, *e.g.*, *United States* v. *Pridgen*, 898 F.2d 1003, 1003 (5th Cir. 1990); *United States* v. *Bates*, 896 F.2d 912, 913 (5th Cir.), cert. denied, 496 U.S. 929, and 496 U.S. 942 (1990). Other violations involve robbers who confront bank employees in their homes and force them to go to the bank to complete the robbery. See, *e.g.*, *United States* v. *Wilson*, 787 F.2d 375 (8th Cir.), cert. denied, 479 U.S. 857, and 479 U.S. 865 (1986). It is common ground that such offenses terrorize the victims and expose them to greater risks of physical injury or death, amply justifying the increased penalties provided by Section 2113(e). Cf. Pet. Br. 26-27.

At the same time, "many" of the cases prosecuted under Section 2113(e) involve forced accompaniment over "short distances, such as from the door of the bank to the vault inside, or within the bank." 3 Leonard B. Sand et al., *Modern Federal Jury Instructions* § 53.05, at 53-76 (2014). Such cases also entail greater trauma and heightened risks for victims—and more culpable conduct by the offenders. In *Davis*, for ex-

ample, the robber seized an employee as she was opening the front door, "jammed [a gun] into her side," and then "paraded [her] about the credit union * * * all the while holding the gun to her side and threatening to kill her." 48 F.3d at 278. In *United States* v. *Sanchez*, 782 F. Supp. 94 (C.D. Cal. 1992), a robber seized an employee, held a "long butcher knife" to her throat while he demanded money from her colleagues, and then "forcibly marched her * * * toward the exit door," releasing her just before leaving the bank. *Id.* at 94-95. In *United States* v. *Lewis*, No. 3:08-cr-175, 2012 WL 2366436 (S.D. Ohio June 21, 2012), robbers "forced a teller * * * to accompany them to a separate area within the bank," "ordered [her] to open the safe," and then fired a handgun "in close proximity to her" in an effort "to motivate [her] to open the safe." *Id.* at *1. In *United States* v. *Whitley*, 734 F.2d 994 (4th Cir. 1984), cert. denied, 474 U.S. 873 (1985), the robber "grabb[ed] a bank employee around the neck and h[eld] a gun to her head," "backed out of the bank still holding the employee, then pushed her aside and fled." *Id.* at 996. And in *United States* v. *Reed*, 26 F.3d 523 (5th Cir. 1994), cert. denied, 513 U.S. 1157 (1995), an employee who was forced to accompany the robber into and around the bank at gunpoint suffered from "post-traumatic stress syndrome" as a result. *Id.* at 530.

All of those cases involved increased physical risks to the victims and conduct more culpable than an unaggravated bank robbery punishable under Section 2113(a) or a simple armed bank robbery punishable under Section 2113(d), which applies whenever a robber displays a weapon. See, *e.g.*, *McLaughlin* v. *Unit-*

*ed States*, 476 U.S. 16, 16-17 (1986). Yet petitioner's proposed substantial-distance requirement would apparently exclude all of them from the reach of Section 2113(e).

2. Petitioner's principal structural argument, echoed by his amici, is that the court of appeals' reading of Section 2113(e) makes that provision applicable to "virtually every bank robbery," (Br. 3, 14), and thereby "all but erase[s] the statutory distinction between a basic offense under [Section] 2113(a) and an aggravated offense under [Section] 2113(e)" (Br. 13).[11] Petitioner reasons (Br. 22) that in the absence of a substantial-distance requirement, Section 2113(e) "would include conduct that occurs routinely in, and is merely incidental to, ordinary bank robberies." That argument rests on a legal error and a mistaken factual premise.

Petitioner's legal error is his assumption (Br. 22) that the court of appeals' reading of Section 2113(e) covers any robber who "exert[s] some control over the movement of the bank's employees" or customers. In fact, Section 2113(e) prohibits forced *accompaniment*, not forced movement. A robber who "who orders a teller to retrieve money from the vault or a customer to lie down on the floor" (Pet. Br. 2) would not be covered under any interpretation of the statute because he has not forced his victims to *accompany* him at all. Petitioner is similarly mistaken in assuming

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[11] See CACL Amicus Br. 3 (asserting that the court of appeals' reading would "turn almost every mine-run bank robbery into a violation of [Section] 2113(e)"); NACDL Amicus Br. 8 ("[I]t is difficult to imagine the course of a bank robbery that does not, at some point, involve the forced movement of individuals in some respect.").

(Br. 22) that the court of appeals' interpretation of Section 2113(e) would reach a "robber who directs a customer to move from the window to the back wall and then takes a few steps in that direction himself." A forced accompaniment occurs when a robber coerces his victims to "go with" him. *Webster's Second* 16. That joint movement is lacking when a robber instructs his victims to move to one side of the bank and then separately takes a few steps in the same direction himself.

Petitioner's mistaken factual premise is his assertion (Br. 22) that bank robbers "almost invariably exert some control over the movement" of employees and customers. That characterization may accord with the portrayal of bank robbery in the movies. In reality, however, so-called "takeover robberies," in which armed intruders assume control of a bank and direct the movements of those inside, are relatively uncommon.[12] A more typical fact pattern is a "note job" in which a single robber passes a demand note to a teller, with or without displaying a weapon, and then walks out of the bank. "Robbers often wait in the teller's line with legitimate customers," and "[i]n many robberies, the event is handled so discreetly that other customers and even other employees are not even aware that a crime has occurred until after the robber has left the premises."[13]

Available statistics further undermine petitioner's claim that bank robberies inevitably involve forced

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[12] Deborah Lamm Weisel, Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Problem-Oriented Guides for Police: Bank Robbery* 13-14 (Mar. 2007), http://www.cops.usdoj.gov/Publications/e03071267.pdf.

[13] *Id.* at 9.

movement or forced accompaniment. The Federal Bureau of Investigation (FBI) determined that in 2011—the most recent year for which statistics are available—the vast majority of bank robberies were limited to the bank's teller counter. FBI, *Bank Crime Statistics 2011*, http://www.fbi.gov/stats-services/publications/bank-crime-statistics-2011/bank-crime-statistics-2011. Only a fraction—fewer than 400 of more than 5000 total robberies—involved the vault, safe deposit, or office areas of the bank. *Ibid.* Weapons were used in less than a third of the incidents, and hostages were taken in only 17 of them. *Ibid.*

That picture is corroborated by Sentencing Commission data. The robbery Guideline provides enhancements if a victim is "abducted" or "physically restrained" during the offense. Sentencing Guidelines § 2B3.1(b)(4). In 2013, the abduction enhancement was applied in only five percent of robberies.[14] The physical-restraint enhancement—which is applicable when a robber forces a victim to move around a bank, see *United States* v. *Albritton*, 622 F.3d 1104, 1107-1108 (9th Cir. 2010)—was applied in only 12.6 percent of robberies.[15]

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[14] U.S. Sentencing Comm'n, *Use of Guidelines and Specific Offense Characteristics* 16 (2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2013/Use_of_Guidelines_and_Specific_Offense_Characteristics_Guideline_Calculation_Based.pdf (*Use of Guidelines*).

[15] *Use of Guidelines* 16. These statistics include all robberies, not just bank robberies, but more than half of the robberies involved the application of an enhancement under Sentencing Guidelines § 2B3.1(b)(1), which applies only if the robbery targeted a "financial institution or post office." See *ibid.*

"A cursory search of the Federal Reporter," *Burrage* v. *United States*, 134 S. Ct. 881, 891 (2014), provides further evidence that forced accompaniment is not a feature of mine-run bank robberies. In many cases, it appears that the perpetrator simply approached a teller, demanded money (with or without brandishing a weapon), and then left. See, *e.g.*, *United States* v. *Reyes*, No. 12-50386, 2014 WL 4358454, at *2 (9th Cir. Sept. 4, 2014); *United States* v. *Marsico*, No. 13-3709, 2014 WL 4212571, at *1 (3d Cir. Aug. 27, 2014); *United States* v. *Anderson*, 755 F.3d 782, 789 (5th Cir. 2014); *United States* v. *Senymanola*, 559 Fed. Appx. 568, 569 (7th Cir. 2014); *United States* v. *Palmisano*, 559 Fed. Appx. 135, 136 (3d Cir. 2014); *United States* v. *Sim*, 556 Fed. Appx. 726, 728 (10th Cir. 2014); *United States* v. *Maynard*, 743 F.3d 374, 376 (2d Cir. 2014); *United States* v. *Jemine*, 555 Fed. Appx. 624, 624 (7th Cir. 2014); *United States* v. *Starnes*, 552 Fed. Appx. 520, 521 (6th Cir. 2014) (per curiam). In others, robbers reached or leapt over counters to remove cash from teller drawers themselves, but again without forcing bank employees or others to accompany them, or even to move. See, *e.g.*, *United States* v. *Feliciano*, 761 F.3d 1202, 1206 (11th Cir. 2014); *United States* v. *Garnett*, 564 Fed. Appx. 959, 960-961 (11th Cir. 2014) (per curiam).[16]

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[16] The only authority on which petitioner relies (Br. 22), the Fifth Circuit's decision in *Reed*, provides no support for his position. In that case, the Fifth Circuit stated that bank robberies "*often*" involve forced movement and that such movement will "*sometimes*" occur in concert with the movement of the robber himself. 26 F.3d at 527 (emphases added). Those statements do not suggest that "virtually every bank robbery" involves forced accompaniment (Pet. Br. 3, 14), and in any event the Fifth Circuit itself cited no authority to support its empirical assertions.

Contrary to petitioner's characterization, therefore, adhering to a natural reading of Section 2113(e) would not result in "nearly every" bank robbery being subject to Section 2113(e)'s enhanced penalties. *Bailey* v. *United States*, 516 U.S. 137, 144 (1995); see *Simpson* v. *United States*, 435 U.S. 6, 11 n.6 (1978) (rejecting a reading of Section 2113(d) that, by definition, would have swept in every robbery committed by "force and violence" in violation of Section 2113(a)). The majority of robberies will continue to be governed by Sections 2113(a) and 2113(d), and Section 2113(e) will continue to apply only in the unusual cases in which a robber forces a victim to accompany him. An atextual substantial-distance requirement is not needed to preserve Section 2113(e)'s place in the statutory scheme.

3. Petitioner also contends (Br. 25-27) that Section 2113(e) should be read to require a substantial movement of the victim because, when Section 2113's predecessor was enacted in 1934, it permitted a sentence of death for a forced-accompaniment offense "if the verdict of the jury shall so direct." § 3, 48 Stat. 783. Petitioner maintains (Br. 26) that in light of the potential imposition of the death penalty, Section 2113(e) must be narrowly limited to conduct comparable to "homicide." But Section 2113's predecessor was drafted long before this Court's modern capital sentencing jurisprudence made homicide a unique basis for imposing the death penalty. Although not all violations are of equal severity, forced-accompaniment offenses can involve multiple victims and traumatizing risks of death or serious injury. In 1934, Congress reasonably concluded that, in an extreme case, retribution and deterrence could warrant the ultimate

punishment for a bank robbery involving forced accompaniment. But it does not follow that Congress intended to restrict the scope of the offense to conduct warranting such severe punishment. To the contrary, even petitioner's reading of the statute reaches offenses less culpable than homicide—for example, a case in which "the robber [took] a hostage out of the bank door while fleeing" (Br. 26), but released the victim unharmed shortly thereafter. The 1934 statute criminalized a range of conduct of varying degrees of culpability and relied on juries to identify those extreme cases warranting a capital sentence.[17]

In any event, as petitioner acknowledges (Br. 27), Congress amended Section 2113(e) in 1994 to eliminate the death penalty as a punishment for a violation of Section 2113(e) unless the defendant killed a victim or the forced accompaniment resulted in death. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, § 60003(a)(9), 108 Stat. 1969. Petitioner's argument based on Section 2113(e)'s penalties rests on the principle that that the words of a statute must be "read in their context." *Davis*, 489 U.S. at 809; see Pet. Br. 19-20. But Congress altered that context when it amended the statute, and a now-repealed penalty provides no structural or contextual basis for an artificially narrow reading of the statute's text. Cf. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) ("[I]t is well established that a court can, and should, interpret the text of one statute in the light of * * * surrounding

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[17] In fact, it appears that no defendant was executed for a violation of Section 2113(e) that did not result in a fatality. See Death Penalty Information Ctr., *Federal Executions 1927-2003*, http://www.deathpenaltyinfo.org/federal-executions-1927-2003.

statutes, even those subsequently enacted."). Petitioner contends (Br. 27) that because the 1994 amendment did not modify the phrase "forces any person to accompany him," the meaning of that phrase must be interpreted based on its original context in the 1934 statute. But this Court rejected a similar argument in *Smith*, holding that even if the surrounding context in a prior version of 18 U.S.C. 924(c) had indicated that Congress intended the term "use" to have a "limited scope," such a limitation had to be rejected as inconsistent with the "language and structure" of the amended statute. 508 U.S. at 236-237; cf. *United States* v. *Ressam*, 553 U.S. 272, 277 (2008) (interpreting statutory language in light of a subsequent amendment to a related provision).[18]

### C. Section 2113(e)'s Legislative History Is Consistent With A Straightforward Reading Of Its Text

Because the meaning of Section 2113(e) is unambiguous, "there is no reason to resort to legislative

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[18] If the scope of Section 2113(e)'s forced-accompaniment offense had been authoritatively construed at the time of the 1994 amendment, Congress might have been presumed to have incorporated that interpretation when it amended the statutory penalties without changing the relevant language. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). As of 1994, however, only three courts of appeals had addressed the degree of movement required by the forced-accompaniment offense, and they had adopted differing views. See *Reed*, 26 F.3d at 527 (holding that movement across a bank's threshold was sufficient, but stating in dicta that movement within a bank would not be); *Bauer*, 956 F.2d at 241 (holding that Section 2113(e) does not "require that the hostages traverse a particular number of feet" or "cross[] a property line"); *United States* v. *Marx*, 485 F.2d 1179, 1186 (10th Cir. 1973) (holding that movement into and around the victim's house was insufficient), cert. denied, 416 U.S. 986 (1974).

history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997); accord *Boyle* v. *United States*, 556 U.S. 938, 950 (2009). In any event, the legislative history of Section 2113's predecessor is "meager," *Prince* v. *United States*, 352 U.S. 322, 328 (1957); *Jerome* v. *United States*, 318 U.S. 101, 104 (1943), and provides no basis for giving the word "accompany" anything other than its ordinary meaning.

1. Petitioner notes (Br. 27-28) that Section 2113(e)'s predecessor was enacted at a time when "notorious" bank robbers such as John Dillinger and Baby Face Nelson sometimes used hostages as human shields on the running boards of their getaway cars. He asserts (Br. 28-29) that "[it] was surely this type of extreme conduct * * * that motivated Congress's decision" to enact the statute. But if that were so, Congress had no reason to exclude robbers who used bank employees and customers as human shields within the bank and its immediate vicinity—conduct that likewise placed the hostages in grave danger. See, *e.g.*, *Outlaws Rob Bank, Kill a Policeman*, N.Y. Times, Jan. 16, 1934, at 42 (robbers used an employee "as a shield [as] they walked out the door" of the bank and "across the sidewalk" to their car while exchanging gunfire with police); *Ohio College Student Used as Shield by Bank Robber Who Wounds Cashier*, N.Y. Times, Oct. 7, 1933, at 3 (robber used a customer as "an unwilling shield" during a shoot-out in a bank).

In any event, "it is not, and cannot be, [this Court's] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy." *Brogan*, 522 U.S. at 403. "[S]tatutory prohibitions often go beyond the principal evil [identified by Congress] to cover reasonably compa-

rable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); accord *DePierre* v. *United States*, 131 S. Ct. 2225, 2235 (2011).

2. Petitioner also observes (Br. 29) that the committee reports on the original version of Section 2113 stated that Section 2113(e)'s predecessor punished "kidnapping" in the course of a bank robbery. H.R. Rep. No. 1461, 73d Cong., 2d Sess. 1 (1934) (House Report); S. Rep. No. 537, 73d Cong., 2d Sess. 1 (1934) (Senate Report). Petitioner therefore contends (Br. 29-30) that the forced-accompaniment offense should be construed in accordance with the contemporary understanding of kidnapping and that, at the time, kidnapping required transportation of the victim for a substantial distance. That chain of reasoning suffers from multiple flaws.

First, petitioner relies on two committee reports totaling slightly less than three pages of text, and each report included only a brief description of Section 2113(e)'s predecessor. House Report 1; Senate Report 1. As the Ninth Circuit has explained, it is natural to use "kidnapping" as a "shorthand description" for Section 2113(e)'s forced-accompaniment offense because the statute "contemplates moving someone by force to someplace he doesn't want to go." *Strobehn*, 421 F.3d at 1019. But shorthand references in two abbreviated committee reports do not justify the conclusion that Congress meant to incorporate the elements of kidnapping into Section 2113(e).

Second, petitioner is wrong to assert (Br. 29-30) that in 1934 kidnapping was understood to require

substantial movement of the victim. By that time, the common law rule that a kidnapping occurs only when the victim is transported out of the country had long been abolished. See 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 750, at 573-574 (9th ed. 1923). Instead, kidnapping was generally defined as "a false imprisonment aggravated by conveying the imprisoned person to some other place." *Ibid.* And during that era, state kidnapping statutes were "interpreted broadly, with the result that almost any movement of the victim satisfie[d] the statutory requirement." Note, *A Rationale of the Law of Kidnapping*, 53 Colum. L. Rev. 540, 545 (1953); accord 3 Wayne R. LaFave, *Substantive Criminal Law* § 18.1(b), at 8 (2d ed. 2003) (LaFave) ("[E]arlier cases took the position that any asportation, no matter how short in time and distance, would suffice."). State courts thus sustained kidnapping convictions where defendants moved victims for relatively short distances, such as from a bank's teller counter "to the vault of the bank" during a robbery, *People* v. *Johnston*, 140 Cal. App. 729, 733 (Cal. Ct. App. 1934), or "from one portion of [a] house to another," *People* v. *Dugger*, 54 P.2d 707, 708 (Cal. 1936).[19]

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[19] See also, *e.g.*, *Cox* v. *State*, 177 N.E. 898, 900 (Ind. 1931) (defendant moved the victim down an alley, a distance of roughly ninety feet); *State* v. *Taylor*, 293 N.W. 219, 224 (N.D. 1940) (defendant forced the victim to drive "a short distance" out of a parking space); see generally *People* v. *Raucho*, 47 P.2d 1108, 1112-1113 (Cal. Ct. App. 1935) ("There is nothing in the law which requires that the victim of a kidnapping shall be transported a mile, a furlong, or any particular distance; and it is only required that there be an actual asportation of the victim without regard to the extent or degree of such movement.").

Third, petitioner goes astray in relying (Br. 30) on the 1932 federal kidnapping statute's requirement that that the kidnapper transport the victim "in interstate or foreign commerce." Act of June 22, 1932, ch. 271, 47 Stat. 326. As the statute's wording makes clear, the requirement that the victim cross state lines was a jurisdictional element included to invoke Congress's Commerce Clause authority. See *Perez* v. *United States*, 402 U.S. 146, 150 (1971); Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L.Q. Rev. 646, 655-662 (1935). It thus sheds no light on the degree of movement Congress understood to be required for a kidnapping.

### D. Interpreting Section 2113(e) In Accordance With Its Natural Meaning Does Not Yield Absurd Results

Petitioner contends (Br. 31-34) that Section 2113(e) must be interpreted to require movement over a substantial distance in order to avoid absurd results. But he provides no evidence of absurdity in the four circuits that have rejected an atextual substantial-distance requirement since as early as 1992. See *Strobehn*, 421 F.3d at 1019-1020; *Turner*, 389 F.3d at 119-120; *Davis*, 48 F.3d at 278-279; *Bauer*, 956 F.2d at 241. His arguments are also unpersuasive on their own terms.

1. Petitioner first argues (Br. 31) that "[i]t would be absurd * * * to treat an unarmed robber who orders a teller to walk with him into the vault as more culpable than one who shoots and wounds the teller." But the government's interpretation of Section 2113(e) does not yield that result. Under Section 2113(e), an unarmed bank robber who forced a teller to accompany him into the vault would be subject to a

statutory minimum sentence of ten years of imprisonment and a maximum sentence of life. 18 U.S.C. 2113(e). But the robber who shot the teller would face stiffer penalties: He would obviously be guilty of violating Section 2113(d) by "assault[ing] [a] person" with "a dangerous weapon" during a bank robbery, an offense carrying a maximum sentence of 25 years of imprisonment. 18 U.S.C. 2113(d). But he would also be guilty of violating 18 U.S.C. 924(c), which provides that a person who discharges a firearm during and in relation to a crime of violence, including a bank robbery, is subject to a "term of imprisonment of not less than 10 years," which must run consecutively to the sentence on the underlying offense. 18 U.S.C. 924(c)(1)(A)(iii), (D)(ii) and (3). The shooter in petitioner's example would therefore be subject to the same statutory minimum (ten years) and the same statutory maximum (life in prison on the Section 924(c)(1) charge) as the robber who violated Section 2113(e), but would face two convictions rather than one and would be required to serve the resulting sentences consecutively.

Petitioner's hypothetical example thus demonstrates no "anomaly"—let alone one that "rises to the level of absurdity" required to justify a departure from the statute's plain terms. *Carter* v. *United States*, 530 U.S. 255, 263 (2000). And, more broadly, the relevant provisions of the Sentencing Guidelines and the discretion of sentencing judges mitigate or eliminate the disparities petitioner fears. As the Eleventh Circuit explained, factors such as the length and duration of the forced accompaniment and the degree of danger to which the victim was exposed "may bear upon the defendant's sentence for forcible

accompaniment" even though "they do not affect the underlying conviction." *Bauer*, 956 F.2d at 241. The robbery Guideline takes into account a variety of aggravating circumstances, prescribing enhancements for threats, the use of weapons, abductions, confinements, injuries to victims, and the amount of loss. See Sentencing Guidelines § 2B3.1(b). And the sentencing ranges prescribed under Section 2113(a), Section 2113(d), and Section 2113(e) substantially overlap. An offender who commits a violation of Section 2113(e) without other aggravating factors is likely to receive a sentence near the ten-year minimum established by that provision. See, *e.g.*, *United States* v. *Bowser*, No. 12-50207, 2014 WL 2599629, at *1 (9th Cir. June 11, 2014) (120 months); *United States* v. *Williams*, 500 Fed. Appx. 364, 364 (6th Cir. 2012) (135 months). In this case, in contrast, petitioner's "egregious" conduct, J.A. 122a, would have yielded a sentence considerably longer than ten years even if his Section 2113(e) conviction had been set aside and he had been sentenced under Section 2113(a) and the accompanying firearms charges alone.[20]

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[20] Petitioner is wrong to assert (Br. 11) that he would have faced a lower Guidelines range absent his forced-accompaniment conviction. Even if petitioner had been convicted only of the attempted bank robbery charged in Count 1 and the firearms offenses charged in Counts 2 and 3, the offense level for the attempted bank robbery would have been governed by the first-degree murder Guideline because the district court found that petitioner's conduct in fleeing from that offense caused Mrs. Parnell's death. See Sentencing Guidelines § 2B3.1(c)(1) (2009); see also *id.* § 1B1.3(a)(1) (providing that the applicable offense level is determined based on conduct that occurred "in the course of attempting to avoid detection" for the offense as well as during the offense itself); J.A. 21a (upholding the district court's application of the first-degree

2. Petitioner next contends (Br. 32-34) that the court of appeals' interpretation "makes the applicability of [Section] 2113(e) turn on a factual distinction largely irrelevant to culpability: whether the victim's movement occurs roughly in concert with the robber." But that argument merely reflects a disagreement with Congress's conclusion that increased punishment is warranted for robberies involving forced accompaniment—which, by definition, is "movement * * * in concert with the robber." Even if petitioner's contention had merit as a policy matter, it would not justify a departure from the statute. Where, as here, the relevant statute is clear, "it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy." *Gonzales*, 520 U.S. at 10.

In fact, however, it was entirely reasonable for Congress to conclude that a robber who forces a victim to accompany him is deserving of greater punishment—and to provide that such increased punishment is appropriate even if the forced accompaniment does not cover a long distance or extend beyond the bank. A forced accompaniment often involves a direct application of physical force to the victim's person. See, *e.g.*, *United States* v. *Banks-Giombetti*, 245 F.3d 949,

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murder Guideline "because [Mrs.] Parnell's death occurred during the course of [petitioner's] attempted robbery"). The forced-accompaniment conviction thus made no difference in petitioner's Guidelines calculation. And although the applicable Guidelines range would have exceeded the 20-year statutory maximum sentence for attempted bank robbery in violation of Section 2113(a), the Guidelines provide that in such circumstances a court should impose consecutive sentences "to the extent necessary to produce a combined sentence equal to the total punishment" called for under the Guidelines. Sentencing Guidelines § 5G1.2(d) (2009).

951 (7th Cir. 2001) (per curiam) (robber who broke into a woman's home while fleeing "pulled her down a flight of stairs, causing her to hit her head on the floor and crack several teeth"); *Davis*, 48 F.3d at 278 (a robber "jammed [a gun] into [an employee's] side); *Whitley*, 734 F.2d at 996 (a robber "grabb[ed] a bank employee around the neck and h[eld] a gun to her head"). Such conduct creates an obvious risk of physical injury and can be highly traumatizing. By definition, a forced accompaniment also requires the victims to remain in close proximity to the robber, where they are subject to continued physical force and threats of violence. See, *e.g.*, *Sanchez*, 782 F. Supp. at 94-95 (robber held a knife to an employee's throat, threatening to kill her unless other employees provided money); *Lewis*, 2012 WL 2366436, at *1 (robbers fired a gun "in close proximity" to an employee to encourage her to open a safe). Finally, the continued proximity to the robber also increases the danger to the victims by placing them in the crossfire in the event of a violent confrontation between the robber and a security guard, a police officer, or an armed bystander. See, *e.g.*, *Green* v. *Freeman*, 434 F. Supp. 2d 1172, 1173-1174 (M.D. Ala. 2005) (customer accidentally shot by police "as [a robber] dragged her across the bank back towards the door"); cf. *McLaughlin*, 476 U.S. at 18 (noting that an armed bank robbery "creates an immediate danger that a violent response will ensue").

### E. Petitioner And His Amici Have Not Identified A Viable Alternative Interpretation Of Section 2113(e)

Petitioner, his amici, and the handful of judicial opinions that have departed from the text of Section 2113(e) advocate a range of different—and contradic-

tory—interpretations of the statute. All of those approaches are unsound.

1. Petitioner contends that Section 2113(e) requires that the robber force the victim to accompany him for a "substantial" distance. But aside from suggesting (Pet. Br. 3, 12, 14, 26) that this requirement is satisfied "where a defendant takes a hostage with him in escaping from the bank," petitioner provides no indication of what constitutes a "substantial" distance. To the extent that petitioner advocates a rule based solely on the number of feet the robber forces the victim to move, no court has endorsed such an interpretation—and with good reason. Any limitation based on distance alone would necessarily be arbitrary and would have no basis in the statutory text.

The same is true of an interpretation of "accompany" that turns on whether the robber forced a victim to enter or exit a bank or other building. The Fifth Circuit appeared to endorse such an approach, holding that any forced accompaniment into or out of a bank satisfies the statutory requirement, but suggesting in dicta that movement within a bank is per se insufficient. *Reed*, 26 F.3d at 527-528. Under that approach, a robber who moved his victim a few feet across a bank's threshold would be covered, see, *e.g.*, *United States* v. *Carr*, 761 F.3d 1068, 1077-1079 (9th Cir. 2014), but one who terrorized a hostage for a longer period and covered a greater distance within the bank would escape increased punishment so long as he released the hostage before leaving, see, *e.g.*, *Sanchez*, 782 F. Supp. at 94-95.

2. Some judges have advocated an approach under which the "substantiality" of a forced accompaniment must be assessed on a case-by-case basis in light of its

"duration, distance and any change in environment tending to increase the danger to which the victim is exposed, other than danger inherent in the underlying offense." *Sanchez*, 782 F. Supp. at 97; see *Strobehn*, 421 F.3d at 1026 (B. Fletcher, J., dissenting) (same). But that multifactor inquiry intended to assess a particular defendant's culpability is not a permissible substitute for the straightforward factual inquiry Congress prescribed. Congress enacted a statute increasing the applicable penalties whenever a robber "forces any person to accompany him." 18 U.S.C. 2113(e). Courts are not free to conclude that only some forced accompaniments qualify based on non-statutory considerations such as distance, duration, and the danger to the victim.

3. Finally, petitioners' amici advocate an interpretation based on the law of kidnapping, relying either on the Model Penal Code (NACDL Br. 18-22) or on state cases decided since the 1960s (CACL Br. 4-20). That approach should be rejected for several reasons.

First, the word "kidnapping" does not appear in Section 2113(e), and the statute does not "incorporate the elements of a kidnapping offense." *Strobehn*, 421 F.3d at 1019. To the contrary, in prescribing increased punishment for a robber who "forces any person to accompany him," Congress used language that differs markedly from common-law or traditional statutory definitions of kidnapping. Cf. 18 U.S.C. 1201(a) (kidnapping statute prescribing punishment for anyone who "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person"). As this Court has held in interpreting another provision of Section 2113, it is inappropriate to impute a com-

mon-law meaning to a statute when "Congress simply describes an offense analogous to a common-law crime without using common-law terms." *Carter*, 530 U.S. at 264-265. And it would be particularly inappropriate to interpret Section 2113(e) based on developments in the law of kidnapping that did not occur until decades after the statute was enacted. See Model Penal Code § 212, at 208 (1980) (the Code was "designed to effect a major restructuring of the law of kidnapping as it existed at the time the Model Code was drafted").

Second, the concerns behind the Model Penal Code and the state cases on which petitioners' amici rely have no application to Section 2113(e). The drafters of the Code and some state courts have attempted to limit the scope of kidnapping to exclude "those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime," such as robbery or rape. *State* v. *Salamon*, 949 A.2d 1092, 1117 (Conn. 2008); see Model Penal Code § 212.1, at 220-221 (explaining that the Code's definition of kidnapping sought to exclude movements or confinements that are "part and parcel" of a robbery, rape, or other offense "and not an independent wrong"). The rationale for that limitation is that a defendant should not be subject to the greater penalties for kidnapping if the movement or confinement at issue "is merely incidental to another offense" subject to lesser punishment. LaFave § 18.1(b), at 11.

Those concerns do not apply in the context of Section 2113(e). State kidnapping statutes typically encompass confinement as well as forced movement and thus might sweep in every instance of robbery, rape, and other offenses that inevitably involve some detention of the victim. See LaFave § 18.1(b), at 9-12.

Section 2113(e), in contrast, covers only forced accompaniment—a feature that is not present in all or even most bank robberies. See pp. 24-28, *supra*. Even more to the point, Section 2113(e) does not define a standalone offense or seek to punish "an independent wrong," Model Penal Code § 212.1, at 221. Rather, Congress framed the statute as an "aggravated form[] of [bank] robbery," *Jones* v. *United States*, 526 U.S. 227, 236 (1999), and increased the applicable penalties for robberies that include forced accompaniments. Giving the statute its natural meaning thus raises no risk of "cumulative penalties or of higher sanctions" than Congress intended to authorize. Model Penal Code § 212.1, at 221.

Third, an approach based on the law of kidnapping would be difficult to apply. The Model Penal Code requires proof that the defendant removed a person "a substantial distance from the vicinity where he is found," but, like petitioner, provides little or no guidance on what qualifies as a "substantial" distance. Model Penal Code § 212.1, at 223.[21] And state courts that have held that kidnapping does not include movements or confinements that are "incidental" to another crime have struggled to define and apply a consistent approach, yielding "much uncertainty" and "confusion * * * even in states where numerous appellate decisions have purported to clarify" the issue. John L. Diamond, *Kidnapping: A Modern*

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[21] The Code also provides that a kidnapping occurs if the victim is removed "from his place of residence or business." Model Penal Code § 212.1, at 209. That rule would yield the odd result that a robber who took an employee out of the bank would be covered, but one who forced a customer to accompany him for the same distance might escape punishment.

*Definition*, 13 Am. J. Crim. L. 1, 3-4 (1985). One court surveyed the law in this area and found "splinter[ed]" decisions and inconsistent results on similar facts, with "cases sustaining and cases reversing separate kidnapping convictions" in every category of circumstances. *State* v. *Stouffer*, 721 A.2d 207, 213 (Md. 1998); see LaFave § 18.1(b), at 10 (describing the "varying results" reached by state courts). For example, the New York Court of Appeals reversed kidnapping convictions in a case where the defendant raped his victims after transporting them from Manhattan to Queens. *People* v. *Lombardi*, 229 N.E.2d 206, 207-209 (N.Y. 1967). Other cases, in contrast, have held that movements as short as "one city block" are sufficient to sustain a separate kidnapping conviction. See, *e.g.*, *Lee* v. *State*, 932 S.W.2d 756, 759 (Ark. 1996); *In re Earley*, 534 P.2d 721, 724 (Cal. 1975). And still other cases applying the "incidental" approach have concluded that even movement within a home or building during a robbery can be sufficient to sustain a kidnapping conviction. See, *e.g.*, *Douglas* v. *State*, 879 A.2d 594, 600 (Del. 2005); *State* v. *Burden*, 69 P.3d 1120, 1121, 1127-1128 (Kan. 2003); *Hutchins* v. *State*, 867 P.2d 1136, 1139-1140 (Nev. 1994). This Court should decline to import a similar level of uncertainty into Section 2113(e).

**F. The Rule Of Lenity Does Not Apply**

Finally, petitioner's appeal to the rule of lenity (Br. 34-35) is misplaced. The rule applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity," *Muscarello*, 524 U.S. at 139 (internal quotation marks and citations omitted), or an "equipoise of competing rea-

sons [that] cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). There is no ambiguity here—much less "grievous ambiguity" or "equipoise." The text of Section 2113(e)'s forced-accompaniment offense unambiguously encompasses forcing a victim to accompany the robber from one room to another, and that interpretation is consistent with the statute's structure, purpose, and history. The rule of lenity "cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term." *Smith*, 508 U.S. at 240 (citation omitted).

## CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted.

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## APPENDIX

1. 18 U.S.C. 2113 provides:

**Bank robbery and incidental crimes**

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not

less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal Credit Union" as defined in section 2 of the Federal credit union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means—

(1) a Federal savings association or State savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)))

having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.

2. The Act of May 18, 1934, ch. 304, 48 Stat. 783, provides:

AN ACT

To provide punishment for certain offenses committed against banks organized or operating under laws of the United States or any member of the Federal Reserve System.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That as used in this Act the term "bank" includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.

Sec. 2. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, manage-

ment, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

Sec. 3. Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct.

Sec. 4. Jurisdiction over any offense defined by this Act shall not be reserved exclusively to courts of the United States.

Approved, May 18, 1934

# REPLY BRIEF

No. 13-9026

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

LARRY WHITFIELD,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## INTRODUCTION

The government acknowledges that Congress intended for 18 U.S.C. § 2113 to "authorize escalating penalties for increasingly serious offenses." Gov't Br. 22. Yet it asks this Court to define forced accompaniment—one of the statute's most serious offenses, addressed alongside murder in § 2113(e)—so broadly that it covers an unarmed robber who forces a teller to move with him for a single step. Under the government's interpretation, that unarmed robber would face dramatically higher § 2113 penalties than the armed robber who gravely injures a teller. That cannot be what Congress intended.

The government argues, in part, that such anomalies in the statutory range would be "mitigate[d]" by "the Sentencing Guidelines and the discretion of sentencing judges." Gov't Br. 35. But post-*Booker* sentencing discretion is no "cure" for anomalous statutory results (*Abbott v. United States*, 562 U.S. 8, 28 (2010)), especially when interpreting a mandatory-minimum provision not subject to judicial override.

The better reading of § 2113(e) is that the robber commits forced accompaniment only if he forces the teller to undertake *substantial* movement with him. Pet. Br. 15-35. That interpretation flows from the ordinary usage of "accompany" and would give full and sensible effect to the statute's penalty structure. While the government says that a substantial-movement standard would be hard to administer, that is incorrect. Juries routinely apply a "substantial" standard in criminal attempt cases and in myriad other contexts.

The government rightly does not argue that this case involved substantial movement or that Whitfield's conviction could be sustained under any standard that requires more than *de minimis* movement. This Court should reject the government's broad interpretation of § 2113(e) and reverse Whitfield's conviction.

## ARGUMENT

### I. The Plain Text Of § 2113(e) Requires More Than *De Minimis* Movement

The government's textual argument relies on stretching the word "accompany" in § 2113(e) to "the outer limits of its definitional possibilities." *Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) (quotation marks omitted). That expansive definition is not justified, both because it fails to give the word its "ordinary" meaning and because it is inconsistent with the statutory context.

To begin, the government provides the following dictionary definition of "accompany": "go with or attend as a companion or associate" or "go along with." Gov't Br. 15. This definition proves Whitfield's point. It does not merely say "go with"; it says "go with or attend *as a companion or associate*" or "go *along* with." The italicized phrases demonstrate that "accompanying" connotes a degree of substantiality beyond merely "going with" another person. Yet the government's analysis omits those modifiers. Gov't Br. 25 ("A forced accompaniment occurs when a robber coerces his victims to 'go with' him.").

The government next invokes a string of citations —to case law, novels, and newspapers—to argue that

"accompany" can include *de minimis* movements. These citations do not justify the government's interpretation for two reasons.

First, strikingly absent from the government's brief is a single statute or regulation—past or present, state or federal—that uses "accompany" to encompass *de minimis* movement. The government's citations to newspaper articles from the 1930s (Br. 19) leave little doubt that it undertook an exhaustive search for such authority and came up empty.

The government's defense of that omission lacks merit. It asserts that, in enacting other statutes, Congress was unconcerned with regulating small movements. Gov't Br. 20. But Congress's general disinterest in small movements scarcely suggests that it intended to regulate small movements here, much less that it meant to do so by using a term that it had otherwise used only in the context of substantial movement.[1] The government also says that the statutes cited in Whitfield's opening brief refer to "long-distance travel," rather than movements of "several blocks" or "several miles." Gov't Br. 20. But numerous modern statutes use "accompany" to cover shorter but still substantial movements. *E.g.*, 10 U.S.C. § 1074i (accompaniment to specialty care provider); 10 U.S.C. § 1105(f)(1)(B) (accompaniment to health care

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[1] Provisions regulating smaller movements typically use language such as "go with." *E.g.*, 10 C.F.R. § 26.107(a)(2) ("Except in the case of a directly observed collection, no one may go with the donor into the room or stall in which the donor will provide his or her specimen ...").

facility). More fundamentally, the government's observation that Congress used "accompany" to refer to long-distance travel only decreases the likelihood that it would have used the same term in § 2113(e) to encompass *de minimis* movements.

The second problem with the government's non-statutory citations is that they establish only that "accompany" is *sometimes* used to cover small movements. But Whitfield does not dispute that such a usage is "grammatically permissible." Pet. Br. 16. Instead, he urges the Court to give the word its "most common meaning," according to how it is "ordinarily used" in "everyday speech." *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 301 (1989); *see also Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 1998-99 (2012) ("That a definition is broad enough to encompass one sense of a word does not establish ... that the word is ordinarily understood in that sense.").

Here, the government's examples do not show how "accompany" is "ordinarily used." Consider this Court's usage. Although the government cites a few decisions that use "accompany" to refer to relatively short movements (Br. 16-17[2]), the Court uses "accompany" far more frequently to refer to long-distance movements. In the 1930's, for instance, the Court used "accompany" in 11 cases to refer to movement by people. Not one involved *de minimis* movement. *See* Appendix A.

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[2] Notably, none involve movement as insubstantial as the four to nine feet at issue here, let alone the single step the government contends is sufficient.

Moreover, even if the ordinary usage of "accompany" were consistent with *de minimis* movement, that would not be enough to justify the government's broad interpretation of § 2113(e). As this Court has recently reiterated, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2441 (2014) (quotation marks omitted). Here, that context cuts unequivocally against the government's expansive definition of forced accompaniment.

## II. The Government's Broad Interpretation Cannot Be Squared With The Statute's Penalty Structure

The government accepts what is evident from § 2113's penalty structure: that "Congress intended to authorize escalating penalties for increasingly serious offenses." Gov't Br. 22. It therefore acknowledges that the heightened penalties for forced accompaniment—a 10-year mandatory minimum and a maximum of life—flow from Congress's conclusion that a robbery involving "forced accompaniment" is "more serious" than an aggravated robbery under 2113(d) where the robber uses a dangerous weapon to assault or endanger the life of another person. Gov't Br. 22. The government tries hard to reconcile its broad view of forced accompaniment with this penalty structure, but its efforts fall short.

### A. A robber who assaults his victim with a dangerous weapon is more culpable than an unarmed robber who engages in *de minimis* movement

The government's lead structural argument is that forced accompaniment involving *de minimis* movement is more culpable than a § 2113(d) offense involving assault or endangerment with a dangerous weapon. In support, the government cites five cases that, in its view, show the culpability of forced accompaniment with *de minimis* movement. Gov't Br. 22-23. But those cases show no such thing. In each one, the egregious conduct is not the *de minimis* movement, but instead the robber's violent use of a weapon to assault or threaten the victim.[3]

It is of course true that a bank robber is more culpable and deserves greater punishment if he engages in the gun-to-the-head or knife-to-the-throat conduct present in the government's cited cases. That is why Congress enacted § 2113(d), which increases the statutory maximum from 20 to 25 years for a robber who uses a dangerous weapon to "assault[] any person, or put[] in jeopardy the life of any person." The forced-

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[3] The government says the cited cases are more serious than the ordinary § 2113(d) case because § 2113(d) "applies whenever a robber displays a weapon." Gov't Br. 23. But the statute requires, as an element of the offense, that the weapon be used to "assault[] any person, or put[] in jeopardy the life of any person." A passive display is not enough. *See United States v. Odom*, 329 F.3d 1032, 1036 (9th Cir. 2003) (weapon must be "actively employed"; thus, robber's "inadvertent display of his gun" did not justify § 2113(d) conviction).

accompaniment provision, however, does not require physical assault or the use of a weapon, and Whitfield did not physically assault Mrs. Parnell or threaten her with a weapon in this case.

Yet the government's position is that the brazen use of a deadly weapon in its five cases is inconsequential to the statutory range because the robber required the victim to take a step or two with him. So, in the government's view, the robber who puts a knife to a customer's throat and says, "Stand still. Don't move an inch," commits a § 2113(d) offense and is subject to a statutory range of 0 to 25 years. But if he instead says, "Take one step with me, away from the window," he's committed a § 2113(e) offense with a statutory range of 10 years to life. That cannot be the distinction Congress intended to draw.

The government's structural argument would make more sense if it could show that the conduct it considers "forced accompaniment"—forcing a victim to move with you for a few feet, *without* the use of a dangerous weapon—is typically more serious than the violent assaults and endangerment covered by § 2113(d). But even the government does not attempt to argue that an unarmed forced movement of a few feet (*i.e.* the conduct present in this case) is itself more serious than a typical § 2113(d) offense.

### B. The government's "joint movement" limitation does not reconcile its broad interpretation with the statutory structure

Whitfield's opening brief argued that "accompany" must be read to require substantial movement because the government's broad view would invite § 2113(e) prosecutions in the mine run of bank robberies. Pet. Br. 22-23. Perhaps worried that its interpretation does invite that problem, the government proposes a limitation. It asserts that forced accompaniment requires "joint movement" but does not apply to a robber who forces his victim to move and then "separately takes a few steps in the same direction himself." Gov't Br. 24-25.

This proffered limitation does not bring the government's interpretation in line with the statute's penalty structure. As an initial matter, there is no clear distinction between "joint movement" and "separately taking steps in the same direction." Perhaps "joint movement" is limited to situations where the robber places hands on the victim and physically escorts her. Or perhaps the standard would be satisfied where the robber directs the victim's movement but follows a step (or two or three) behind. The government does not say.

More importantly, wherever the line falls, it would bear little relationship to the robber's culpability. Jointly walking the teller to the vault at gunpoint is, if anything, only marginally more culpable than directing the teller to the vault at gunpoint while following a step or two behind. Yet, in the government's view, this

distinction triggers a tremendous difference in the statutory range.

Indeed, if the Court takes seriously the government's "joint movement" limitation, then Whitfield is not guilty of forced accompaniment. There is no evidence that Whitfield touched Mrs. Parnell or physically escorted her into the room. *See* Pet. Br. 5. Instead, the evidence of forced accompaniment came from Whitfield's statement, where he admitted that he "probably took a couple steps in [to the computer room], but I didn't go all the way through ... she just sat down, and I just went to get the phone." J.A. 163a.[4] While that evidence shows that Whitfield and Mrs. Parnell entered the computer room, it does not show that they engaged in "joint movement," as opposed to "separately tak[ing] a few steps in the same direction."

Not surprisingly, then, the government made no attempt at trial to satisfy its illusory "joint movement" standard. Rather than focus on movement, much less "joint movement," the government repeatedly argued to the jury that Whitfield was guilty of forced accompaniment because he confined Mrs. Parnell to her home (i.e. "held her against her will"). Pet. Br. 7-8.

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[4] *See also* JA 160a-161a ("She'll tell you I ain't, get close to her, scare her or none of that. ... I was really keeping my distance from her and just letting her know that. See ma'am I'm not here to hurt you.").

### C. A wide swath of otherwise ordinary bank robberies would include "forced accompaniment" under the government's definition

The government advances several other arguments (Br. 25-28) designed to assure the Court that forced accompaniment, even under its broad interpretation, is "unusual" (Br. 28). Each argument falls short.

First, the government cites statistics showing that bank robberies occur most frequently at the counter. Gov't Br. 25-26. The government's unstated premise is that such robberies do not involve forced accompaniment. But that is not necessarily true—so long as the robber walks a single step away from the counter with a customer or moves with the teller from the left side of the counter to the right side, the government's broad view of forced accompaniment would be satisfied. *See, e.g., Wise v. United States*, No. 07-cv-046, 2007 WL 4571295, at *4 (S.D. Ohio Dec. 26, 2007) (robber "vaulted over the counter and took control of the tellers behind the teller line"), *report & recommendation adopted by*, 2008 WL 399289 (S.D. Ohio Feb. 12, 2008); *Henry v. United States*, No. Civ. 00-cv-666, 2000 WL 1825402, at *1 (D. Conn. Nov. 21, 2000) (robber "vaulted over the teller's counter and ordered the tellers to move back" but "did not display a weapon or specifically threaten to harm the customers or the tellers").

Second, the government observes that the Guidelines enhancements for abduction and physical restraint apply in relatively few robbery cases. Gov't Br. 26. But those enhancements are a poor proxy for

the government's broad interpretation of forced accompaniment. The abduction enhancement applies where the robber moves the victim "to a different location" (U.S. Sentencing Comm'n Guidelines Manual ("U.S.S.G.") § 1B1.1 cmt. n.1(A) (Nov. 2013)), a standard that comports with Whitfield's interpretation of § 2113(e), not the government's. Similarly, the physical-restraint enhancement typically applies where the victim is "tied, bound, or locked up" (*id.* cmt. n.1(K)), but the government's broad interpretation of § 2113(e) does not require such conduct.[5] Notably, the PSR in this very case did not recommend, and the district court did not apply, the abduction or physical-restraint enhancement—a point that belies the

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[5] The government cites the Ninth Circuit's decision in *Albritton* to argue that the physical-restraint enhancement applies "when a robber forces a victim to move around a bank." Gov't Br. 26. But unlike *Albritton*, many circuits stick to the Guidelines text and require a "physical" restraint, so that directing a person's movement at gunpoint "without more, is insufficient." *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999); *see United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000) (holding that "[t]he required restraint must, as the language plainly recites, be physical"; thus, directing a person's movement at gunpoint was insufficient where the offender "did not physically touch" the person); *United States v. Hickman*, 151 F.3d 446, 461-62 (5th Cir. 1998) (rejecting government argument that "physical restraint" enhancement "need not encompass the use of actual physical force"; thus, pointing a gun at employee to force compliance did not justify the enhancement), *approved in relevant part*, 179 F.3d 230, 231 (5th Cir. 1999) (en banc).

government's assertion that these enhancements track its broad view of forced accompaniment.[6]

Third, the government cites a series of mostly unpublished circuit decisions to show that "forced accompaniment is not a feature of mine-run bank robberies." Gov't Br. 27. But none of those opinions addresses whether a forced accompaniment occurred, and their truncated factual recitations make it impossible to tell whether the robbery involved forced accompaniment under the government's *de minimis* standard.

Far from proving that a typical bank robbery does not include *de minimis* forced movement, a "cursory search of the Federal Reporter," *Burrage v. United States*, 134 S. Ct. 881, 891 (2014), shows that the government simply has not believed that such movement justifies a § 2113(e) charge. In case after case, fact patterns that would satisfy the government's interpretation of forced accompaniment have been prosecuted under § 2113(a) or (d), resulting in sentences based on the Guidelines and the § 3553(a) factors that fall below the mandatory minimum for a § 2113(e) offense. *See United States v. Victor*, 719 F.3d 1288, 1290 (11th Cir. 2013) (robber directed employee from lobby to teller line, but "did not physically touch the lobby employee and moved her only a few steps"; received within-Guidelines sentence of 37 months on § 2113(a) count); *United States v. Albritton*, 622 F.3d 1104, 1106 (9th Cir. 2010) (robber ordered bank

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[6] *See* CAJA 1443-57 (PSR); Supp. CAJA 99 (PSR supplement for resentencing).

employee from her office and followed her at gunpoint; received within-Guidelines sentence of 105 months on § 2113(a) count; *United States v. Taylor*, 620 F.3d 812, 812-13 (7th Cir. 2010) (robber grabbed teller by neck and led her at gunpoint from vault to teller's position; received within-Guidelines sentence of 110 months on § 2113(d) count); *United States v. Stevens*, 580 F.3d 718, 719-20 (8th Cir. 2009) (robber "ushered" employees into break room at gunpoint and later "marched the employees to the bank's vault"; received within-Guidelines sentence of 60 months on § 2113(a) count).

These outcomes are consistent with the U.S. Attorney's Manual, which provides that a forced-accompaniment charge requires "abduction"—a position the government has abandoned in this litigation.[7] If this Court adopts the government's newly broadened interpretation of § 2113(e), prosecutors will be required to evaluate whether *de minimis* movement occurred during a robbery, a fact previously thought too trivial to justify a Guidelines enhancement, much less a 10-year mandatory minimum. The result, inevitably, will be a dramatic uptick in § 2113(e) prosecutions. *See* Transcript of Oral Argument at 28-29, *Yates v. United States*, No. 13-7451, (U.S. Nov. 5, 2014) (conceding that U.S. Attorney's Manual's "default principle" is that "the prosecutor should charge ... the offense that's the most severe under the law").

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[7] *See* U.S. Dep't of Justice, United States Attorneys' Manual, tit. 9, Criminal Resource Manual § 1349 (2012).

These practical considerations highlight what the government is truly asking for in this case: a broad reading that gives prosecutors the power to apply, or threaten to apply, § 2113(e)'s harsh mandatory minimum in a wide swath of bank robberies. *See Southern Union Co. v. United States*, 132 S. Ct. 2344, 2371 (2012) (Breyer, J., dissenting) (discussing how a prosecutor, "perhaps armed with statutes providing for mandatory minimum sentences, can become the ultimate adjudicator" in a plea-bargaining system). That cannot be what Congress intended, especially given that mandatory minimum sentencing laws were rare when Congress passed this statute in 1934. *See, e.g.*, Kate Stith & José A. Cabranes, *Fear of Judging* 9-10 (1998) (noting that "[f]rom the beginning of the Republic," the "great majority of federal criminal statutes have stated only a maximum term of years and a maximum monetary fine," with mandatory minimums being rare until recent times).

### D. The government has no answer to Congress's decision to treat forced accompaniment like murder and other capital offenses

The government also cannot square its interpretation with Congress's decision to treat forced accompaniment alongside murder and other capital crimes. Most important, the government offers no response to the point that forced accompaniment appears in the same sentence as the offense of "kill[ing] any person" in connection with a robbery. 18 U.S.C. § 2113(e). Under the *noscitur a sociis* canon, this relationship demonstrates that Congress viewed the

two offenses as similarly culpable, which undermines the government's view that forced accompaniment includes *de minimis* movement. Pet. Br. 26.

Beyond linking forced accompaniment to murder, Congress also made forced accompaniment a capital offense. Perhaps realizing that Congress could not have sought to punish trivial "joint movement" with death, the government speculates that Congress "criminalized a range of conduct of varying degrees of culpability and relied on juries to identify those extreme cases warranting a capital sentence." Gov't Br. 29.

Congress did not take this approach anywhere else in the U.S. Code. Instead, it authorized the death penalty for a small number of crimes that invariably present a high level of culpability: murder, insurrection, espionage, rape, and kidnapping involving harm to the victim. *See* Pet. Br. 26. For example, when § 2113 was enacted in 1934, Congress also imposed the death penalty for kidnapping. But Congress did not allow juries to sort out when a kidnapping would justify the death penalty; instead, it made the offense death-eligible *only* when the victim was not "liberated unharmed." 18 U.S.C. § 408a (1934). It is implausible that the same Congress would have so tightly restricted jury discretion in kidnapping cases while granting broad discretion in forced-accompaniment cases involving *de minimis* movement. More likely, Congress did not intend the forced-accompaniment provision to cover *de minimis* movement.

The government also suggests that Congress silently broadened the scope of forced accompaniment

in 1994 when it eliminated the death penalty for the offense. Gov't Br. 29-30. That is wrong. Congress repealed the death penalty for forced accompaniment — and for 14 other crimes—in an omnibus statute designed to conform the U.S. Code to Supreme Court decisions limiting the permissible scope of the federal death penalty. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, § 60003, 108 Stat. 1796, 1968-70 (1994); *see also* H.R. Rep. No. 103-466 (1994). There is no evidence whatsoever that Congress intended this technical amendment to broaden the substantive scope of all 15 statutes. *See, e.g., United States v. O'Brien*, 560 U.S. 218, 233 (2010) (declining to infer change in criminal statute's substantive scope based on unrelated amendments); *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1999) ("[I]t tests the limits of reason to suggest that despite such silence, Members of Congress ... intended to enact" a "significant change" in statute's meaning).

The government cites two cases for its argument (Br. 30), but neither holds that repealing a penalty provision silently expands a criminal statute's substantive scope. In *Smith v. United States*, 508 U.S. 223 (1993), Congress substantively broadened a criminal statute by punishing, for the first time, the use of guns in drug offenses, so the Court construed the word "use" in light of Congress's purpose in imposing that new substantive provision. *Id.* at 236-37. In *United States v. Ressam*, 553 U.S. 272 (2008), Congress substantively amended an explosives statute after it amended a firearms statute, and the Court drew an inference from the difference between the explosives

statute and the previously-amended firearms statute. *Id.* at 277.

These cases do not hold that reducing the *penalty* for a crime, much less conforming the penalty to Supreme Court case law, alters the crime's *substantive* scope. If the government's position were correct, then presumably the reverse would be true as well, such that when Congress *increases* the penalty for an existing crime, it also intends to *decrease* the crime's substantive reach. We doubt the government would support that analysis. *See Yates* Oral Argument Tr., *supra*, at 45-46 (government asserting "there's no reason to think that when Congress tinkered with that penalty, it meant to kind of, by implication, shrink the [substantive] scope").

## III. The Government's Interpretation Produces Absurd Results

As explained in Whitfield's opening brief, interpreting § 2113(e) to encompass *de minimis* movement would lead to absurd results. For instance, under the government's interpretation, a robber who walks a step with another person without consent would be subject to a higher statutory range than a robber who gravely injures that person. Pet. Br. 31-32.

The government does not deny that its interpretation creates such anomalies in the statutory ranges under § 2113. Instead, it claims that other statutes remedy those § 2113 anomalies. That cannot be right because the other statutes did not exist when Congress passed § 2113.

The government first observes that a robber who discharges a firearm could face a consecutive criminal sentence under 18 U.S.C. § 924(c). Gov't Br. 34-35. That is true only for a robber who uses a gun; the absurdity would remain for a robber who *stabbed* someone. But, even more fundamentally, § 924(c) is irrelevant here because it was enacted long after § 2113 and thus sheds no light on Congress's intent in enacting § 2113(e). Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 197, 233.

The government next suggests that anomalous § 2113 ranges can be ironed out through the Sentencing Guidelines. Any such ironing will be limited, however, because the Guidelines cannot override § 2113(e)'s 10-year mandatory minimum. Further, because the Guidelines did not exist when § 2113(e) was passed, they shed no light on Congress's intent at that time. Indeed, even for statutes passed after the Guidelines were adopted, this Court has rejected—at the government's urging—the possibility that Congress might have relied on the Guidelines to resolve anomalies in a statutory sentencing scheme. *Abbott*, 562 U.S. at 28-29. The better approach is to conclude that Congress did not intend to create statutory anomalies in the first place. Here, that means rejecting the government's *de minimis* interpretation of forced accompaniment.[8]

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[8] The government is wrong to say (Br. 36 n.20) that the first-degree murder Guideline applies to Whitfield's § 2113(a) conviction and that he would face the same guidelines range absent his § 2113(e) conviction. The PSR concluded that the murder Guideline did not apply to the § 2113(a) count, and the government

In response to the apparent absurdities under § 2113, the government also renews its contention that even *de minimis* forced movement is more serious than a § 2113(d) offense. It supports that theory by asserting that such forced movement "often involves a direct application of physical force to the victim's person," "threats of violence," and threats of "crossfire." Gov't Br. 37-38. But Congress directly addressed assaultive and threatening conduct in § 2113(d), so there is no reason to believe that it created a separate provision—with dramatically harsher penalties—based on speculation that *de minimis* movement *correlates* with assaultive and threatening conduct. And needless to say, the government's broad interpretation would apply to cases of *de minimis* movement that do not involve physical force, threats of violence, or dangerous weapons, such as the alleged "forced accompaniment" at issue in this very case.

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waived any argument to the contrary by not objecting. *See* CAJA 1449-50 (PSR calculation for Count One). Even if the government's argument were not waived, it lacks merit. The robbery Guideline expressly distinguishes between *victims* of the crime and *other persons* affected by the crime, and it cross-references the murder guideline only when the *victim* dies. *See* U.S.S.G. § 2B3.1. Although Mrs. Parnell was the victim of the alleged forced-accompaniment offense, she was not the victim of the bank robbery itself. CAJA 1449 (PSR concluding that "Count Four [i.e., the forced-accompaniment count] involves a separate victim and is treated separately").

## IV. The History And Purpose Of § 2113(e) Establish That It Does Not Encompass *De Minimis* Movements

As explained in Whitfield's opening brief, Congress enacted the forced-accompaniment provision amidst a wave of John Dillinger-style robberies where bank employees and customers were whisked from the bank and used as human shields to protect the gangsters during their getaway. Pet. Br. 27-29. Such crimes bear no resemblance to the *de minimis* movement at issue here. The government suggests that Congress might have intended to punish "robbers who used bank employees and customers as human shields," Br. 31, but even that scenario bears no resemblance to the facts of this case. The government correctly states that statutory prohibitions may "go beyond the principal evil ... to cover reasonably comparable evils," Br. 32 (quotation marks omitted). But forcing someone to move a few feet with you is not "reasonably comparable" to Dillinger's dramatic abduction of hostages. The *de minimis* movement swept in under the government's broad interpretation is completely, not just slightly, different from the conduct Congress targeted in the forced-accompaniment provision.

Further, the government's broad interpretation is hard to reconcile with the historical evidence that Congress in 1934 equated forced accompaniment with kidnapping. Pet. Br. 29-30. The government asserts, based on a 1923 treatise, that the common-law kidnapping rule, which required transportation out of the country, "had long been abolished" in 1934. Gov't Br. 33. But contemporary case law confirms that the

common-law rule was alive and well. *Collier v. Vaccaro*, 51 F.2d 17, 18 (4th Cir. 1931) (applying traditional common-law definition of kidnapping); *Gooch v. United States*, 82 F.2d 534, 537 (10th Cir. 1936) (noting that "kidnapping at common law means to forcibly abduct a person and to carry him from one state into another state"). In any event, the definition in the 1923 treatise—requiring "conveying the imprisoned person to some other place," Gov't Br. 33—itself suggests more than *de minimis* movement.

The government also cites assorted state court cases that adopt a broad view of kidnapping. Gov't Br. 33-34. But the majority of those cases were decided after 1934, meaning they could not have informed Congress's understanding of "kidnapping" when it passed § 2113(e). Further, the federal kidnapping statute provides a better window into Congress's understanding of "kidnapping" than state judicial decisions. And it required both movement across state lines[9] and that the kidnapping take place over "an

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[9] The government asserts that the state-lines requirement was "a jurisdictional element intended to invoke Congress's Commerce Clause authority." Gov't Br. 34. But Congress could have authored a kidnapping statute that did not require the victim to cross state lines. Indeed, it later did just that. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 213(1), 120 Stat. 587, 616 (amending statute to cover kidnappings where "the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense"). In any event, the pertinent point is that the federal kidnapping statute did not, in 1934, cover *de minimis* movement.

appreciable period" of time. *See Chatwin v. United States*, 326 U.S. 455, 460 (1946). Those requirements are inconsistent with the government's view that forced accompaniment includes ephemeral movements such as the one in this case.

## V. Substantial Movement Is An Administrable Standard

The government argues that Whitfield has not provided a "[v]iable [a]lternative [i]nterpretation" of forced accompaniment. Gov't Br. 38. That criticism lacks merit.

The correct interpretation of § 2113(e) provides a straightforward legal standard: a forced accompaniment occurs when a robber forces another person to engage in substantial movement with him. *See* Pet. Br. 12, 26-27, 34. Far from being novel or nonviable, that standard resembles the one already used in the Eleventh Circuit's pattern jury instructions for a § 2113(e) offense. *See* Pattern Jury Instructions (Criminal Cases) No. 76.4 (11th Cir. 2010) ("What the Government must prove beyond a reasonable doubt is that the victim's forced movement in the Defendant's company was of some substance or significance and not a trivial or insignificant movement.").

Juries also routinely determine what is "substantial" under other federal statutes. When the government charges an *attempt* to commit a federal crime, for example, the jury must determine whether the defendant took a "substantial step" toward committing the offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007). A similar inquiry is

required in many other criminal contexts. *See, e.g.*, *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2071 (2011) (noting the Model Penal Code's definition of recklessness, which requires a jury finding that a defendant "knows of a substantial and unjustified risk"); 18 U.S.C. § 113(a)(7) (criminalizing "[a]ssault resulting in substantial bodily injury"); 18 U.S.C. § 1365 ("serious bodily injury" element of consumer tampering offense defined in part as an injury presenting a "substantial risk of death"); 18 U.S.C. § 2261A (stalking offense requires finding of "substantial emotional distress"); *cf. Neder v. United States*, 527 U.S. 1, 20-25 (1999) (holding that certain federal fraud statutes implicitly require a jury finding that falsity is "material"). In short, a jury is perfectly capable of determining whether movement was sufficiently "substantial" to constitute forced accompaniment. *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011) (holding that "everyday words" may be submitted to jury, which "can comprehend those words and apply them in light of their experience and common sense").

The government also argues that a test of "substantiality" based solely on distance or solely on a threshold-crossing would produce "arbitrary" results. Gov't Br. 39. As an initial matter, it is hard to imagine a more "arbitrary" test than the government's, which imposes greatly heightened punishments for movement of a single step.

In any event, the government's concerns are ill-founded. A jury instructed to determine whether the defendant engaged in substantial movement with the

victim would not be consigned to make arbitrary distinctions based on whether a threshold was crossed or a particular number of feet traveled. Rather the jury would apply its "experience and common sense" to determine whether the movement was sufficiently substantial to merit additional punishment. That inquiry is no different from the one juries undertake everyday in the context of attempt and other doctrines.[10]

In reality, robbery cases tend to have recurring fact patterns, and most will be classified with ease. Moving a teller to the vault or a customer to a windowless office would not be "substantial" in most circumstances, whereas taking a hostage from her home to the bank or from the bank to the getaway car typically would be. Of course, as with any statute, borderline cases will occasionally arise, and for those the jury will make a judgment on a case-by-case basis. But the fact that borderline cases will arise does not mean the Court should throw up its hands and interpret § 2113(e) to cover *de minimis* movement. Instead, the Court can be confident that a jury deciding a borderline case will

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[10] Whitfield agrees with the government that factors unconnected to movement — such as duration and dangerousness — are not relevant to the "accompaniment" determination under § 2113(e). Gov't Br. 39-40. Such factors, of course, may properly enter into the sentencing calculus under 18 U.S.C. § 3553(a). Moreover, even if the Court adopted a multi-factor test under § 2113(e), the government has rightly never argued that such a test could be satisfied on the facts of this case, where the "accompaniment" was "for a brief period" (JA 65a) and moving from the hallway to the computer room was not dangerous.

focus on a fact directly tied to the robber's culpability: whether the movement was sufficiently substantial to warrant heightened punishment. In contrast, the government's test would turn on facts too trivial to justify a 10-year mandatory minimum: whether the robber took a single step with the victim and whether the movement was sufficiently "joint" under the government's ill-defined standard.

## VI. Whitfield's Conviction Must Be Reversed

The government does not dispute that Whitfield's conviction cannot be upheld under any legal standard other than *de minimis* movement. That concession is correct: the movement here covered just a few steps, occurred entirely within Mrs. Parnell's home, and did not involve any violent force. If any "accompaniment" is *de minimis*, this is it. Whitfield's conviction should be reversed.

## CONCLUSION

This Court should reverse Whitfield's § 2113(e) conviction and remand for resentencing on the other counts.

Respectfully submitted,

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# Appendix A

**Supreme Court cases from the 1930's using the word "accompany" to refer to movement by people**

| Case | Use of "accompany" |
|---|---|
| *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 542 (1935) | "It was necessary for them to return to California in order to receive their full wages. They would be ***accompanied*** by their fellow workers, who would normally be the witnesses required to establish the fact of the injury and its nature. The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation." |
| *Brown v. Mississippi*, 297 U.S. 278, 281-83 (1936) | "On that night one Dial, a deputy sheriff, ***accompanied*** by others, came to the home of Ellington, one of the defendants, and requested him to ***accompany*** them to the house of the deceased, and there a |

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| | number of white men were gathered, who began to accuse the defendant of the crime...<br>A day or two thereafter the said deputy, ***accompanied*** by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama[.]<br>...<br>The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, ***accompanied*** by a number of white men, one of whom was also an officer, and by the jailer, came to the jail[.]<br>...<br>[O]n the next day, that is, on Monday, April 2, when the defendants had been |

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| | given time to recuperate somewhat from the tortures to which they had been subjected, the two sheriffs, one of the county where the crime was committed, and the other of the county of the jail in which the prisoners were confined, came to the jail, ***accompanied*** by eight other persons, some of them deputies, there to hear the free and voluntary confession of these miserable and abject defendants." |
| *Dunn v. United States*, 284 U.S. 390, 395 (1932) (Butler, J., dissenting) | "Eight days later federal officers having a warrant for arrest ***accompanied*** by one of the prohibition agents raided the place and arrested petitioner." |
| *Hansen v. Haff*, 291 U.S. 559, 561 (1934) | "In May, 1931, she made a second visit to Denmark to see her relatives. On this occasion she was ***accompanied*** by the man with whom she had been intimate, who paid part of |

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| | her expenses." |
| *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 248-49 (1939) | "At about six o'clock in the evening the superintendent, ***accompanied*** by police officials and respondent's counsel, went to each of the buildings and demanded that the men leave." |
| *Powell v. Alabama*, 287 U.S. 45, 51 (1932) | "Chief Justice Anderson pointed out in his opinion that every step taken from the arrest and arraignment to the sentence was ***accompanied*** by the military. Soldiers took the defendants to Gadsden for safekeeping, brought them back to Scottsboro for arraignment, returned them to Gadsden for safekeeping while awaiting trial, escorted them to Scottsboro for trial a few days later, and guarded the court house and grounds at every stage of the proceedings." |

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| *Snyder v. Massachusetts*, 291 U.S. 97, 103, 117 (1934); id. at 123, 135, 138 (Roberts, J., dissenting) | "At the opening of the trial there was a motion by the commonwealth that the jury be directed to view the scene of the crime. The motion was granted . . . ***Accompanied*** by these bailiffs and also by the judge, the court stenographer, the district attorney, and the counsel for the defendants, they went forth to make their view. The first stopping place was at the filing station, 13 Somerville avenue . . . [Other stopping places omitted] . . . After the completion of the view, the group returned to the courthouse and the trial went on."<br><br>"It is one thing to say that the prevailing practice is to permit the accused to ***accompany*** the jury, if he expresses such a wish. It is another thing to say that the practice may not be changed without a denial of his privileges |

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| | under the Constitution of the United States."<br><br>"Counsel for the petitioner moved that his client be permitted to ***accompany*** the jury on the view, asserting this was the defendant's right under the Federal Constitution. The motion was denied and an exception reserved to the ruling. The judge, the official stenographer, the district attorney, and counsel for the defendants, ***accompanied*** the jury to the scene."<br><br>"[A]n examination of the cases discloses none (with a single possible exception) where a denial of his request to ***accompany*** the jury on the view has not been held reversible error. And the statements that a view is not a part of the trial or that it is not the taking of evidence, and denying, on that ground, the defendant's right to be |

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| | present, are invariably found in cases where the defendant requested the view and did not ask to ***accompany*** the jury, or waived either expressly or by conduct his right so to do. Such statements are dicta, since the accused waived whatever right he had. Moreover, in several of the opinions which deny the right it is said that the prisoner ought always to be allowed to ***accompany*** the jury if he so requests."<br><br>"Little wonder, in these circumstances, that the court felt it right to appoint the defendants' counsel to ***accompany*** the jury on the view." |
| *Sorrells v. United States*, 287 U.S. 435, 439 (1932) | "The substance of the testimony at the trial as to entrapment was as follows: For the Government, one Martin, a prohibition agent, testified that having resided for a time in Haywood County, North |

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| | Carolina, where he posed as a tourist, he visited defendant's home near Canton, on Sunday, July 13, 1930, ***accompanied*** by three residents of the county who knew the defendant well." |
| *Southern Pacific Co. v. United States*, 285 U.S. 240, 241-42 (1932) | "During the years 1920-1923, both inclusive, the company, upon transportation requests issued by the War Department, the Navy Department, and the Marine Corps of the United States, transported military prisoners and their guards; . . . escorts ***accompanying*** the remains of deceased soldiers; . . . and stranded enlisted men of the navy traveling back to their proper stations." |
| *United States v. Oregon*, 295 U.S. 1, 16 (1935) | "The Special Master inspected Lake Malheur Reservation on or about November 1, 1931, |

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| | ***accompanied*** by counsel and engineers representing the parties." |
| *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162, 168 (1933) | "Respondent's contention was that Voehl was going to the warehouse for a purpose of his own, -- to obtain ashes to place in front of his house, being ***accompanied*** by his brother-in-law to assist him in their removal." |

# AMICUS CURIAE BRIEF

No. 13-9026

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ON WRIT OF CERTIORARI TO THE
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FOR THE FOURTH CIRCUIT

## BRIEF FOR AMICUS CURIAE THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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## BRIEF FOR AMICUS CURIAE THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

## INTEREST OF AMICUS CURIAE[1]

The Center on the Administration of Criminal Law (the "Center") is dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's

[1] Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amicus curiae or its counsel contributed money or services to the preparation or submission of this brief. All parties have consented to the filing of this brief.

litigation component aims to use its empirical research and experience with criminal justice practices to assist courts in important criminal cases. To that end, the Center has filed numerous briefs on behalf of the government and defendants in both state and federal courts. The Center's focus on government practices in criminal cases and on the exercise of prosecutorial power and discretion, its research-based approach, and its diversity of work make it the first and only organization of its kind.

The Center submits this brief out of concern that the government's boundless construction of 18 U.S.C. § 2113(e) erases statutory distinctions, conflicts with legislative intent, and would lead to substantial injustice throughout the country. Countless state high courts have reached these conclusions through years of experience and reasoning rooted in this Court's precedents. The Center is well-suited to provide this context to the Court.

## SUMMARY OF ARGUMENT

State courts have long grappled with defining the bounds of criminal liability for kidnapping. In particular, numerous state courts have assessed when independent criminal liability will arise by virtue of forced movements or confinements during the commission of a distinct underlying crime, such as robbery. Widespread agreement now exists among the states that insubstantial movements or confinements, especially those that are incidental to the underlying crime, should not give rise to separate liability.

This Court should draw on the collective wisdom of these state courts in construing 18 U.S.C. § 2113(e). The reasoning behind these decisions is largely applica-

ble here, especially because many of the interpretive tools used by the state courts to construe their respective kidnapping statutes are tools regularly used by this Court. Applying these tools to § 2113(e) demonstrates that it should be read to exclude from its reach insubstantial or incidental movements that occur during a bank robbery.

First, the language of criminal statutes must be read in the context of their associated penalty schemes. Doing so ensures that when Congress distinguishes between a base offense and an aggravated offense, the distinction is preserved. If the bar to liability under an aggravated offense is brought too low, it effectively collapses the distinction that Congress has drawn. For that reason, federal and state courts seek to avoid construing aggravated offenses like § 2113(e) so broadly as to make them virtually coextensive with the base offense. To do otherwise would turn almost every mine-run bank robbery into a violation of § 2113(e). Moreover, Congress is generally presumed to incorporate into criminal statutes a proportionality between the punishment and the culpability of the prohibited conduct. Interpreting § 2113(e) to cover *de minimis* and incidental movement would eliminate the proportionality that Congress incorporated into this statutory scheme.

Second, statutory language must be read in its historical context. State courts have relied on this Court's decision in *Chatwin* v. *United States*, 326 U.S. 455 (1946), which narrowly construed the Federal Kidnapping Act, notwithstanding its broad language, in light of the historical problems that Congress was trying to solve. The history and circumstances surrounding the passage of § 2113(e) share much with the Federal Kidnapping Act. That history illustrates that Congress

was concerned with conduct far more severe than *de minimis* or incidental movements.

Third, courts seek to strike a balance between legislatures' power to define crimes and prosecutors' discretion in charging them. Courts recognize that a critical part of maintaining this balance is ensuring that crimes are not construed so broadly as to allow prosecutors to seek disparate punishments for similar conduct. Given the significant difference between the penalties for violations of § 2113(a) and § 2113(e), broadly construing the latter would provide prosecutors with significant discretion, and thus leverage in our criminal justice system that relies so heavily on plea-bargaining, that Congress did not intend.

In sum, a broad construction of § 2113(e) would eviscerate Congress' carefully-drawn distinctions, unmoor the statute from its historical and legislative purpose, and unfairly lead to disparate punishments for similar conduct. State courts across the country have learned these lessons through decades of experience. This Court should apply their reasoning here.

## ARGUMENT

### I. THE EXPERIENCE OF STATE HIGH COURTS SUPPORTS THE CONCLUSION THAT INCIDENTAL OR INSUBSTANTIAL MOVEMENTS DO NOT TRIGGER § 2113(e) LIABILITY

In interpreting 18 U.S.C. § 2113(e), this Court should look to the collective wisdom of the numerous state courts that have confronted similar questions and concluded that forced movement or confinement during the commission of a crime does not give rise to a separate and more harshly punished offense if it is insubstantial or incidental to the commission of the underlying offense.

Similar to § 2113(e), myriad states have kidnapping statutes that punish, among other things, forced movement (or confinement) of bystanders that occurs during the commission of other crimes. Interpreting those statutes for decades, state high courts have grappled with a question little different from the one presented here: If, in the commission of a crime such as robbery, forced movement of a bystander occurs, when does such movement rise to the level of a separate offense for kidnapping? In assessing that question, the collective wisdom of a large and diverse set of state courts accords with Whitfield's interpretation of § 2113(e). For conduct in the commission of an underlying crime to rise to the level of a distinct kidnapping violation, the conduct must constitute more than an insubstantial forced movement or movement incidental to the underlying crime. The reasoning behind these State court decisions is highly instructive and should inform the Court's resolution of the question currently before it.

As the New York Court of Appeals explained, "[i]t is unlikely that" restraints or movements that "are incidents to other crimes ... were intended by the Legislature in framing its broad definition of kidnapping to constitute a separate crime of kidnapping." *People* v. *Levy*, 204 N.E.2d 842, 844 (N.Y. 1965). Similarly, the California Supreme Court limited its state's kidnapping-to-commit-robbery statute, holding that the legislature intended to reach movements "*only* if the movements (1) are not merely incidental to the commission of the robbery *and* (2) substantially increase the risk of harm beyond that inherent in the crime of robbery." *In re Earley*, 534 P.2d 721, 725 (Cal. 1975). The California Supreme Court further explained that movement will generally be insufficient "when in the course of a rob-

bery a defendant does no more than move his victim around inside the premises in which he finds him—whether it be a residence, as here, or a place of business or other enclosure." *People* v. *Daniels*, 459 P.2d 225, 238 (Cal. 1969); *see also Levy*, 204 N.E.2d at 844 (overturning conviction for kidnapping that allegedly occurred in the course of a robbery because "the case now before us is essentially robbery and not kidnapping").

Other examples of states declining to interpret statutes to reach insubstantial or incidental conduct abound. *E.g.*, *State* v. *Rich*, 305 N.W.2d 739, 745 (Iowa 1981) ("[W]e conclude that our legislature ... intended the terms 'confines' and 'removes' to require more than the confinement or removal that is an inherent incident of commission of the crime of sexual abuse."); *see also State* v. *Salamon*, 949 A.2d 1092, 1119 (Conn. 2008) (collecting cases from various states where courts determined that legislature did not intend to punish conduct as kidnapping where it was "merely incidental to the commission of a separate, underlying crime"); 3 Wayne R. LaFave, *Substantive Criminal Law* § 18.1(b), at 11 (2d ed. 2003) (same).[2]

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[2] To be sure, state courts have set forth varying standards for the requisite forced movement. But the different standards amount only to different paths to the same result. For example, *State* v. *Buggs*, 547 P.2d 720, 731 (Kan. 1976), rejected California's requirement that movement increase the risk of harm. Nevertheless, it required, *inter alia*, that the movement not be "slight, inconsequential, and merely incidental to the other crime." *Id.* Ultimately, "[t]he basic question to which each of these tests is directed is whether the restraint or movement increases the culpability of the defendant over and above his culpability for the other crime." *State* v. *Trujillo*, 289 P.3d 238, 250 (N.M. Ct. App.), *cert. granted* 297 P.3d 122 (N.M. 2012); *infra* Part B.2.; *see also Government of Virgin Islands* v. *Berry*, 604 F.2d 221, 227 (3d Cir. 1979) (surveying various states' tests).

Moreover, unlike here, where the most natural reading of "accompany" favors Whitfield (Pet Br. 15-19), many of the state statutes at issue in these cases could be read literally to encompass any instance of forced movement or confinement and thus are no narrower than § 2113(e).[3] *See, e.g.*, *Rich*, 305 N.W.2d at 742 ("'either confines a person or removes a person from one place to another'" (quoting Iowa Code § 710.1 (1979))); *State* v. *Ripley*, 626 S.E.2d 289, 293 (N.C. 2006) ("'confine, restrain, or remove from one place to another, any other person ... for the purpose of ... [f]acilitating the commission of any felony'" (quoting N.C. Gen. Stat. § 14-39(a) (2005); emphasis omitted)); *Garza* v. *State*, 670 S.E.2d 73, 75 (Ga. 2008) ("'steals away any person ... and holds such person against his will'" (quoting Ga. Code Ann. § 16-5-40 (Supp. 2006))), *superseded in part by statute as stated in State* v. *Clements*, 715 S.E.2d 59, 66 n.6 (Ga. 2011).[4]

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[3] This is not a coincidence. The legislative history demonstrates that Congress understood § 2113(e) to be a "kidnapping" during a bank robbery provision. *See* H.R. Rep. No. 73-1461, at 1 (1934) ("If murder or kidnaping be committed in connection therewith the penalty shall be imprisonment from 10 years to life, or death if the jury shall so direct"); S. Rep. No. 73-537, at 1 (1934) ("A heavy penalty is imposed on anyone who commits a homicide or kidnaping in the course of such unlawful act" (internal quotation marks omitted)); *see also* Pet. Br. 29 & n.10. Indeed, because the Federal Kidnapping Act was limited to kidnappings across state lines, *see* Pub. L. No. 72-189, 47 Stat. 326 (1932), and because of the limited jurisdiction of federal courts, it makes sense that Congress would proscribe kidnappings during bank robberies within § 2113.

In any event, the state kidnapping jurisprudence is instructive regardless of how § 2113(e) is labeled.

[4] State statutes generally supplanted the common-law crime of kidnapping. *See* Note, *A Rationale of the Law of Kidnapping*, 53 Colum. L. Rev. 540, 541 (1953) ("Every jurisdiction today has

Despite this breadth, courts have frequently found that legislatures did not intend for the provisions, including terms like "confines," "carries," or "removes," to be given their broadest, or even literal, meaning. *See Mobley* v. *State*, 409 So. 2d 1031, 1034 (Fla. 1982) (noting that "[m]ost courts have reasoned that the legislatures did not intend for the statutes to be literally applied"). Otherwise, conduct that has "long been treated as integral parts of other crimes," such as walking a bank employee from her desk to the vault during a robbery, without more, could be punishable under the sweep of a forced movement statute, and that cannot be what legislatures intended. *Levy*, 204 N.E.2d at 844; *People* v. *Lombardi*, 229 N.E.2d 206, 208 (N.Y. 1967) (reversing conviction even though underlying conduct "comes literally within the terms of the kidnapping statute").[5] Put differently, forced movement and confinement prohibitions, like § 2113(e), "will sweep within [their] scope conduct that is decidedly wrongful but that should be punished as some other crime." *Garza*, 670 S.E.2d at 76 (internal quotation marks and citation omitted).

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kidnapping legislation."); *see also, e.g.*, *Ripley*, 626 S.E.2d at 292 (observing that legislature "abandoned the traditional common law definition of kidnapping for an element-specific definition"); *Daniels*, 459 P.2d at 232 (noting that legislature had "rejected the common-law definition of kidnaping and redefined it").

[5] *See also State* v. *Innis*, 433 A.2d 646, 655 (R.I. 1981) (declining to "apply the wording of the statute in a literal manner" while reversing conviction); *State* v. *Goodhue*, 833 A.2d 861, 868 (Vt. 2003) (rejecting "literal interpretation of the statutory language" as not "sensible or just" in reversing conviction); *People* v. *Bridges*, 612 P.2d 1110, 1112 (Colo. 1980) (reversing conviction even though underlying conduct was "perhaps technically within the language of the statute"), *rejected in part on other grounds by People* v. *Lowe*, 660 P.2d 1261, 1266 (Colo. 1983), *abrogated on other grounds by Callis* v. *People*, 692 P.2d 1045, 1050 & n.7 (Colo. 1984).

Indeed, in at least 15 states, high courts have nullified convictions on the ground that the forced movement or confinement was merely incidental to a separate, underlying crime (with some states doing so multiple times). In each of these cases, the language of the statute could have been read to encompass the respective victim's movement or confinement. But in each case, the high court ruled that the conviction could not stand.[6]

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[6] The states from which those decisions arose are California, Colorado, Connecticut, Florida, Georgia, Kansas, Iowa, Michigan, Minnesota, Nevada, New York, North Carolina, Rhode Island, South Dakota, and Vermont. *See Daniels*, 459 P.2d at 228-238 [Cal.]; *People* v. *Williams*, 471 P.2d 1008, 1011-1014 (Cal. 1970); *People* v. *Mutch*, 482 P.2d 633, 638-639 (Cal. 1971); *People* v. *Timmons*, 482 P.2d 648, 649-651 (Cal. 1971), *overruled in part as stated in In re Earley*, 534 P.2d 721, 727 (Cal. 1975); *People* v. *Adams*, 482 P.2d 652, 652-653 (Cal. 1971); *People* v. *Ungrad*, 482 P.2d 653, 653-654 (Cal. 1971); *People* v. *Killean*, 482 P.2d 654, 655 (Cal. 1971); *People* v. *Smith*, 482 P.2d 655, 656 (Cal. 1971); *People* v. *Adams*, 482 P.2d 657, 657-658 (Cal. 1971); *People* v. *Hunter*, 482 P.2d 658, 659 (Cal. 1971); *People* v. *Coleman*, 482 P.2d 660, 660 (Cal. 1971); *People* v. *Norman*, 482 P.2d 661, 662 (Cal. 1971); *People* v. *Morrison*, 482 P.2d 663, 663-664 (Cal. 1971); *In re Crumpton*, 507 P.2d 74, 75-76 (Cal. 1973); *Bridges*, 612 P.2d at 1112-1117 [Colo.]; *Salamon*, 949 A.2d at 1102-1122 [Conn.]; *State* v. *Sanseverino*, 949 A.2d 1156, 1164-1168 (Conn. 2008), *overruled in part by State* v. *DeJesus*, 953 A.2d 45, 58 (Conn. 2008), *and superseded in part by State* v. *Sanseverino*, 969 A.2d 710 (Conn. 2009); *Walker* v. *State*, 604 So. 2d 475, 476-477 (Fla. 1992); *Garza*, 670 S.E.2d at 74-79 [Ga.]; *State* v. *Cabral*, 619 P.2d 1163, 1165-1166 (Kan. 1980); *State* v. *Ransom*, 722 P.2d 540, 545-547 (Kan. 1986); *State* v. *Hays*, 883 P.2d 1093, 1102-1104 (Kan. 1994); *State* v. *Mead*, 318 N.W.2d 440, 441-445 (Iowa 1982); *State* v. *Marr*, 316 N.W.2d 176, 177-180 (Iowa 1982); *People* v. *Adams*, 205 N.W.2d 415, 418-424 (Mich. 1973); *State* v. *Smith*, 669 N.W.2d 19, 30-33 (Minn. 2003), *overruled in part on other grounds by State* v. *Leake*, 699 N.W.2d 312, 323 (Minn. 2005); *Levy*, 204 N.E.2d at 843-845 [N.Y.]; *Lombardi*, 229 N.E.2d at 208-209 [N.Y.]; *People* v. *Cassidy*, 358 N.E.2d 870, 872-874 (N.Y. 1976); *People* v. *Cain*, 556 N.E.2d 141, 144 (N.Y. 1990); *Wright* v. *State*,

This Court too has found that statutory terms should not necessarily be given their broadest meanings. In *Abuelhawa* v. *United States*, 556 U.S. 816, 820 (2009), for example, this Court rejected the government's construction of a term by its "literal sweep," observing that "because statutes are not read as a collection of isolated phrases, *a word in a statute may or may not extend to the outer limits of its definitional possibilities*." (emphasis added; internal quotation marks, citation, and alterations omitted). A year earlier, the Court overturned a conviction under the Armed Career Criminal Act because it concluded that, *even assuming the defendant's conduct fell within the literal scope of the statute*, Congress did not intend for such conduct to be covered. *Begay* v. *United States*, 553 U.S. 137, 141-143 (2008).

This principle applies with particular force when the question is the existence of a *de minimis* exception, because such exceptions are often presumed. "[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). Section 2113(e) contains no "contrary indication" on this score.

Finally, some of these state court decisions came after experience under a different regime, namely the one urged by the government here. In these states,

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581 P.2d 442, 443-444 (Nev. 1978); *State* v. *Irwin*, 282 S.E.2d 439, 445-446 (N.C. 1981); *Ripley*, 626 S.E.2d at 290-294 [N.C.]; *Innis*, 433 A.2d at 652-655 [R.I.]; *State* v. *Reiman*, 284 N.W.2d 860, 873-874 (S.D. 1979); *Goodhue*, 833 A.2d at 868-869 [Vt.].

kidnapping statutes were at points interpreted to cover any amount of movement or confinement, no matter how minimal or incidental to some other crime. After experience with this virtually boundless interpretation, though, the relevant high courts determined that it could not have been what their legislatures intended. As such, the courts started moving towards a "more enlightened, modern approach." *Salamon*, 949 A.2d at 1116-1118.

For example, the relevant California statute had been interpreted in the 1950s to cover "forcibly moving the victim any distance whatever," "no matter how short or for what purpose," because "'[i]t is the fact, not the distance, of forcible removal which constitutes kidnaping in this state.'" *Daniels*, 459 P.2d at 238 (quoting *People* v. *Chessman*, 238 P.2d 1001, 1017 (Cal. 1951), *overruled by Daniels*, 459 P.2d at 238). Much like the government's position here (Br. Opp. 13-14), this prior precedent relied on the lack of an express distance requirement in the statute and emphasized that if this result "is regarded as too harsh, the remedy is for the Legislature to redefine kidnaping." *People* v. *Wein*, 326 P.2d 457, 466 (Cal. 1958), *overruled by Daniels*, 459 P.2d at 238. But citing a "current of common sense" and decades of experience, *Daniels* overruled that precedent in favor of the not incidental and substantiality requirements. 459 P.2d at 229, 238.[7] This Court should

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[7] *See also Garza*, 670 S.E.2d at 76, 78 (basing its decision to limit the scope of the kidnapping statute on what the "Court ha[d] witnessed" and ultimately interpreting the statute to prohibit conduct that "is in the nature of the evil the kidnapping statute was originally intended to address—i.e., movement serving to substantially isolate the victim from protection or rescue," as opposed to "merely a criminologically insignificant circumstance attendant to some other crime" (internal quotation marks omitted)).

draw on these experiences and reject the government's equally boundless view.

## II. Section 2113(e) Does Not Reach Incidental Or Insubstantial Movements

Section 2113(e) shares many of the characteristics of the state statutes for which state courts have excluded insubstantial or incidental conduct. In particular, (1) § 2113's graduated penalty scheme; (2) the historical context surrounding the passage of the statute; and (3) the risk of disparate treatment all favor a measured interpretation of § 2113(e).

### A. The Culpability Of Prohibited Conduct And Associated Penalties Under § 2113 Should Be Commensurately Graduated

Section 2113's graduated penalty scheme warrants recognition of a *de minimis* or incidental conduct exception. *See* Pet. Br. 21-23.

Federal and state courts alike have long considered the applicable penalty scheme in construing the scope of criminal statutes. This interpretive tool can be used here in two different ways—to assess the distinction between § 2113(e) and the base offense as well as to assess the proportionality of culpability and punishment. Both point toward § 2113(e) excluding *de minimis* or incidental movement from its reach.

*First*, when Congress has distinguished between levels of culpability within a statute, those distinctions should be preserved. If the threshold for a defendant to move from a base offense to an aggravated offense is made too low, it effectively collapses the statutory gradations, thereby disserving Congress's purpose. This Court has admonished against an overly-broad inter-

pretation of an aggravated offense because it leads to liability under the aggravated provision in "nearly every [instance]" of the base offense. *Bailey* v. *United States*, 516 U.S. 137, 144 (1995), *superseded by statute as stated in United States* v. *O'Brien*, 560 U.S. 218, 232-233 (2010) (internal quotation marks and alterations omitted). Such interpretations, the Court explained, "eras[e] the line that the statutes, and the courts, have tried to draw." *Id.* (internal quotation marks omitted); *see also Abuelhawa*, 556 U.S. at 821-822 (rejecting broad reading of statute that "would for practical purposes skew the congressional calibration of ... penalties"); *United States* v. *Collins*, 313 F.3d 1251, 1254 (10th Cir. 2002) ("[T]he provision makes a distinction between possession and use; the provision must not be interpreted such that this distinction collapses, rendering part of the provision a nullity.").[8]

This principle finds ample support in state experience as well. State courts have vigorously patrolled the boundaries between forced movement (or confinement) and underlying crimes. Indeed, the comparable severity of kidnapping penalties relative to penalties for an underlying crime where no kidnapping is involved has been perhaps the most important factor driving state courts' conclusions that their legislatures did not intend to reach incidental or insubstantial movements. *See, e.g.*, *Rich*, 305 N.W.2d at 745 ("[B]ecause of the substantial disparity between sentences the legislature intended the kidnapping statute to be applicable only to those situations in which confinement or removal definitely

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[8] This principle takes on added significance where the penalties between the statutory subsections in question are markedly different, as is the case with § 2113(a) and § 2113(e). *Compare* 18 U.S.C. § 2113(a) (sentencing range of zero to twenty years) *with* 18 U.S.C. § 2113(e) (sentencing range of ten years to life in prison).

exceeds that which is merely incidental to the commission of sexual abuse."); *Goodhue*, 833 A.2d 861, 868 (Vt. 2003) (concluding that "literal application of the statutory language" was not legislature's intent in light of "significant difference" in penalties between kidnapping with intent to commit sexual assault and sexual assault); *Garza*, 670 S.E.2d at 77 (rejecting prior "expansive construction of asportation" on the ground that it "effectively eviscerates the distinction between kidnapping and false imprisonment, .... fails to justify the dramatic distinction in penalties between the two offenses, and simply cannot represent what the Legislature intended in enacting the current kidnapping statute."); *Salamon*, 949 A.2d at 1118 (overruling prior precedent that included incidental movement because it effectively "merged" gradations installed by the legislature); *State* v. *Stouffer*, 721 A.2d 207, 215 (Md. 1998) ("We recognize the problem ... that a literal reading of the kidnapping law could have the effect of transforming a host of lesser-punished sex and street crimes into 30-year eligible kidnappings, and we do not believe that the Legislature ever intended for [the kidnapping statute] to be read in that broad a fashion."). In this case, as Whitfield has argued, the government's proposed construction would swallow up mine-run bank robberies and escape attempts into the aggravated forced-accompaniment offense, because nearly every bank robbery in violation of § 2113(a) might include some forced movement of victims. *See United States* v. *Reed*, 26 F.3d 523, 527-528 (5th Cir. 1994) ("Within the context of a bank robbery, there will often be movement within the bank by a bank employee—movement orchestrated by the robber. This orchestration will no doubt sometimes occur in concert with the movement of the robber himself. To conclude such circumstances are an aggravating accompaniment

would likely convert numerous ordinary ... bank robberies to aggravated bank robberies with only the faintest of distinctions"); *accord* Pet. Br. 22. Congress could not have intended that almost every violation of subsection (a) also amount to a violation of subsection (e), with its far more severe penalties. This attempt to collapse the distinction between § 2113(a) and § 2113(e) should not be allowed.

*Second*, Congress should be presumed to act with the "salutary objective[] of promoting sentences proportionate to the gravity of the offense." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009) (internal quotation marks omitted). Congress would not intend, therefore, for significant increases in required statutory minimums to turn on trivial movements, or happenstance untethered to culpability. State courts likewise have sought to ensure that punishments for forced movements during the commission of another crime are commensurate with the culpability of the defendant's conduct. *See, e.g.*, *Garza*, 670 S.E.2d at 76 ("[I]s it reasonable to believe that the Legislature intended the mere fact of a victim's movement from one point to another within the situs of the robbery to justify another ten-years-to-life sentence in addition to the ten years to life prescribed for armed robbery?"); *State* v. *Innis*, 433 A.2d 646, 655 (R.I. 1981) ("To apply the wording of the statute in a literal manner would run the risk of kidnapping convictions based on trivial changes in location having no bearing on the evil at hand." (internal quotation marks omitted)); *In re Crumpton*, 507 P.2d 74, 76 (Cal. 1973) (holding that legislature did not intend liability to be "based on movement of the victim that is criminologically insignificant"). Whitfield persuasively explains how the same proportionality concerns apply here. *See* Pet. Br. 31-34.

### B. The Historical Context Of § 2113(e) Illustrates Congress's Focus On Specific, Severe Conduct

The historical context of the Federal Bank Robbery Act also illustrates that Congress was *not* targeting *de minimis* or incidental movement through § 2113(e). *See* Pet. Br. 27-30.

As this Court has explained, historical context is an important tool in construing a kidnapping statute. In *Chatwin* v. *United States*, 326 U.S. 455, the Court recounted the genesis of the Federal Kidnapping Act. *Id.* at 462. A close cousin of the Federal Bank Robbery Act, the Kidnapping Act also was passed in a "background of organized violence," when kidnappings for ransom "had become an epidemic in the United States." *Id.*

The *Chatwin* Court proceeded to reverse a conviction where the underlying facts "reveal[ed] a situation quite different from the general problem to which the framers of the Federal Kidnapping Act addressed themselves." 326 U.S. at 462. The Court recognized that a "loose construction" of the language could encompass the defendant's conduct, but held that "the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy .... Were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity."[9] *Id.* at 464.

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[9] State courts have continually relied on *Chatwin* in construing their own kidnapping statutes. *See, e.g.*, *Levy*, 204 N.E.2d at 844-845 (reversing conviction because movement was incidental and under *Chatwin* not "in the nature of true kidnapping"); *Mead*, 318 N.W.2d at 445 (similar); *Berry*, 604 F.2d at 226 (relying on

State courts have likewise looked to the historical context in which kidnapping statutes were passed to inform their interpretation of such statutes.[10] *See, e.g.*, *Ripley*, 626 S.E.2d at 291. Indeed, courts have specifically connected the historical context to the determination that the statute should have a narrowed scope. The Supreme Court of Georgia, for example, detailed the historical background of its kidnapping statute, before explaining that state courts had lost sight of that background and "ha[d] come to expand the concept of kidnapping so drastically from its origins as to encompass movements as slight as stepping from one room of an apartment into another." *Garza*, 670 S.E.2d at 76. The court then narrowed the scope of the statute to avoid such results. *Id.* at 77-78; *see also, e.g.*, *Salamon*, 949 A.2d at 1114-1115 (discussing "historical backdrop" of statute and noting that "[a]mong the evils that ... statutory prohibitions against kidnapping sought to address were the isolation of a victim from the protections of society and the law and the special fear and danger inherent in such isolation").

Here, as Whitfield recounts in detail, § 2113(e) was enacted in response to particularly serious conduct by John Dillinger and others. *See* Pet. Br. 27-30. The Court should not allow a statute enacted in that context

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*Chatwin* to reverse kidnapping conviction as incidental movement under Virgin Islands law).

[10] A number of these state kidnapping statutes were enacted at the same time as the Federal Kidnapping Act and the Federal Bank Robbery Act. *See, e.g.*, *Innis*, 433 A.2d at 652 (discussing how applicable version of statute had been enacted in 1932); *see also* Note, 53 Colum. L. Rev. at 540 (discussing how "wave of kidnappings" in the late 1920s and early 1930s prompted "state legislatures to make sweeping changes in the kidnapping laws").

to be expanded to reach *de minimis* or incidental movement that is far removed from its original intent.

### C. Congress Did Not Intend To Cede Prosecutors The Power To Charge Nearly Every Mine-Run Bank Robbery Under § 2113(e)

Finally, the existence of prosecutorial discretion does not militate towards a broad reading of § 2113(e). Just the opposite. Under the government's definition of § 2113(e), prosecutors would have the option to pursue the severe sanctions afforded by that provision selectively for mine-run bank robberies, leading to potentially disparate punishment for similar conduct. At a minimum, prosecutors could use the threat of a mandatory minimum sentence to force plea bargaining. *Cf. Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012) (observing that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system" (internal quotation marks omitted)); *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2371 (2012) (Breyer, J., dissenting) (discussing how prosecutor in such plea-bargaining system, "perhaps armed with statutes providing for mandatory minimum sentences, can become the ultimate adjudicator"). Given the widely disparate penalties between § 2113(a) and § 2113(e), this is no small tool for prosecutors; it is a sledgehammer.

When possible statutory enhancements for kidnapping are involved, state high courts have recognized that legislatures did not intend to give prosecutors this power. *See Rich*, 305 N.W.2d at 745 ("[W]e do not believe the legislature intended to afford the prosecution a choice of two penalties of such a disparate nature for the typical crime of sexual abuse"); *Goodhue*, 833 A.2d at 868 (similar); *Garza*, 670 S.E.2d at 77 (rooting decision partly "in the desirability of avoiding arbitrary and

selective enforcement of criminal laws" and observing that "experience reveals numerous instances of abusive prosecution under expansive kidnapping statutes for conduct that a rational and mature penal law would have treated as another crime" (internal quotation marks omitted)); *People* v. *Miles*, 245 N.E.2d 688, 695 (N.Y. 1969) ([T]he *Levy-Lombardi* rule was designed to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal."); *Salamon*, 949 A.2d at 1118 (observing that prior loose construction in Connecticut precedent "[u]nfortunately ... has afforded prosecutors virtually unbridled discretion to charge the same conduct either as a kidnapping or as an unlawful restraint despite the significant differences in the penalties that attach to those offenses"); *Mobley*, 409 So. 2d at 1035 (discussing how high courts have reasoned in this context "that a narrow construction of the statutes was necessary to prevent the abuse of prosecutorial discretion").

What is more, this Court has held that "prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes." *Abuelhawa*, 556 U.S. at 823 n.3 ("Of course, Congress legislates against a background assumption of prosecutorial discretion, but this tells us nothing about the boundaries of punishment within which Congress intended the discretion to be exercised").

In § 2113, Congress created a purposeful distinction between more typical bank robberies and those involving meaningful forced movements of victims. Preserving Congress's chosen scheme depends on § 2113(e) requiring more than *de minimis* or incidental movement. Otherwise, the statutory gradations are ceded to prosecutors, who would be free to decide in virtually every case whether to charge a given bank robbery as an ag-

gravated offense. But defining federal offenses is firmly in Congress's exclusive domain and this Court should resist any interpretation that transfers that power to prosecutors. After all, as the adage goes, the punishment should fit the crime, not the prosecutor's bargaining leverage.

* * *

At the state level, "the direction of the criminal law has been to limit the scope of the kidnapping statute, with its very substantially more severe penal consequences, to true kidnapping situations and not to apply it to crimes which are essentially robbery ... and in which some confinement or asportation occurs as a subsidiary incident." *Lombardi*, 229 N.E.2d at 208 (internal quotation marks omitted). In interpreting § 2113(e), this Court should follow the same "direction" and find that the provision does not reach *de minimis* movements that are incidental to a bank robbery.

## CONCLUSION

For the foregoing reasons, as well as those presented by Whitfield, this Court should hold that incidental or insubstantial movements are insufficient to trigger application of § 2113(e). Under that standard, Whitfield's conviction under § 2113(e) should be overturned.

Respectfully submitted.

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# AMICUS CURIAE BRIEF

No. 13-9026

IN THE

# Supreme Court of the United States

LARRY WHITFIELD,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER


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## INTEREST OF AMICUS CURIAE[1]

Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice including issues involving criminal justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and numerous other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the court of appeals and the government have adopted a broad interpretation

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief, and letters reflecting their consent were filed contemporaneously with this brief.

of an ambiguous provision in the federal bank robbery statute, 18 U.S.C. § 2113(e). Where, as here, the government seeks an expansive reading of an ambiguous mandatory minimum statute, NACDL has a strong interest in advocating that the rule of lenity be applied to interpret that ambiguity in favor of the petitioner, and in seeking clear standards for interpreting that statute in future cases.

## INTRODUCTION AND SUMMARY

This Court has long used the rule of lenity to construe ambiguous criminal statutes in favor of the defendant. *United States* v. *Bass*, 404 U.S. 336, 347-48 (1971). Petitioner Whitfield makes a compelling argument that 18 U.S.C. § 2113(e) should be read in his favor without resorting to the rule of lenity. But if any residual doubts remain, the rule of lenity clarifies those doubts and dictates that a conviction under § 2113(e) requires substantial movement of the victim.

The phrase "forces any person to accompany him" is ambiguous. Although the term "accompany" connotes some movement of the victim, the statute is silent as to how much movement triggers the enhanced penalties of § 2113(e). This ambiguity is demonstrated by a myriad of lower court opinions, interpreting this phrase and reaching conflicting conclusions. Faced with dueling interpretations, "the tie must go to the defendant." See *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

The rule of lenity ought to be given special force in cases where an ambiguous statute such as § 2113(e) imposes a mandatory minimum sentence. Because of the conflicting interpretations in the lower courts, asymmetric punishments for the same conduct may result. Moreover, the principles supporting the rule

of lenity—fair notice and separation of powers—are heightened where, as here, severe mandatory sentences result from a vague statutory phrase.

In addition to the Court's finding that forced accompaniment requires substantial movement of the victim, amicus respectfully suggests that the Court look to the Model Penal Code's provision for kidnapping in interpreting § 2113(e). That is, a conviction for forced accompaniment under § 2113(e) requires evidence that a bank robber "unlawfully remove[d] another from his place of residence or business, or a substantial distance from the vicinity where he [was] found . . . ." See Model Penal Code ("M.P.C.") § 212.1.

A more definitive interpretation is especially important for statutes mandating minimum sentencing terms. With mandatory minimums, any ambiguity about Congress's intentions should trigger the rule of lenity in light of the drastic reductions in liberty at stake. Clarity also helps prevent arbitrary and inconsistent application of the statutory penalties to different defendants who commit similar acts in the course of a bank robbery or an escape.

## ARGUMENT

### I. THE RULE OF LENITY SUPPORTS THE NARROW CONSTRUCTION OF 18 U.S.C. § 2113(e) URGED BY PETITIONER IN THIS CASE

The rule of lenity dictates that "where text, structure, and history fail to establish that the Government's position is unambiguously correct," ambiguity should be resolved in the defendant's favor. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) (citing *Bass*, 404 U.S. at 347-49). This longstanding principle is often used "when choice has to be made be-

tween two readings of what conduct Congress has made a crime," *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-22 (1952), commanding that in such cases, "the tie must go to the defendant," *Santos*, 553 U.S. at 514 (plurality opinion).

Petitioner Whitfield sets forth a compelling argument that the forced accompaniment provision in 18 U.S.C. § 2113(e) is best read in his favor even without resorting to the rule of lenity. But, if after consulting the statute's text, structure, history, and purpose, ambiguity remains, the rule of lenity resolves any residual doubts. See *Granderson*, 511 U.S. at 54.

### A. The Phrase "Forces Any Person To Accompany Him" Is Ambiguous

To be subject to the ten-year mandatory minimum sentence in § 2113(e) for forced accompaniment, a defendant must not only have robbed (or attempted to rob) a bank, but in the process he must have "force[d] any person to accompany him without the consent of such person."[2] Although the term "accompany" connotes some movement in tandem, the statute is silent as to how far the defendant must force his victim to travel before he becomes eligible for the additional ten-year mandatory minimum.

As a result of this ambiguity, lower courts have reached a myriad of conflicting interpretations of the forced accompaniment provision. The broadest read-

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[2] The full text of 18 U.S.C. § 2113(e) provides that "[w]hoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment."

ing of the term "accompany," and that applied in this case,[3] finds the defendant culpable for even slight movement of the victim. See, *e.g.*, *Turner*, 389 F.3d at 119-20 (finding forced accompaniment conviction appropriate where defendant forced victim to bank vault by gunpoint); see also *United States* v. *Bauer*, 956 F.2d 239, 241 (11th Cir. 1992) (finding that "[t]here is no requirement . . . that the defendant crossed a property line . . . , that the hostages traverse a particular number of feet, that the hostages be held against their will for a particular time period, or that the hostages be placed in a certain quantum of danger"). The narrowest reading of the term "accompany" finds that more substantial movement of a victim during a bank robbery is necessary to trigger the mandatory minimum. See, *e.g.*, *United States* v. *Marx*, 485 F.2d 1179, 1186 (10th Cir. 1973) (analogizing forced accompaniment to kidnapping and stating that "more is required than forcing [the victim] to enter his own house or forcing the [victim's] family to move from the den to a bedroom"). Still other interpretations require something in between *de minimis* and substantial movement. See, *e.g.*, *United States* v. *Strobehn*, 421 F.3d 1017, 1020 n.1 (9th Cir. 2005) (stating, without elaboration, that § 2113(e) does not apply to "*any* forced accompaniment, no matter how slight" (citation omitted)).

Beyond the particular tests applied, the type of conduct punished under § 2113(e) varies wildly. At the more egregious end of the spectrum are cases

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[3] In affirming Mr. Whitfield's conviction, the court of appeals conceded that Mr. "Whitfield required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period" but stated that "no more is required to prove that a forced accompaniment occurred." *See* J.A. 65a (citing *United States* v. *Turner*, 389 F.3d 111, 119-20 (4th Cir. 2004)).

where defendants broke into bank employees' homes, held their relatives hostage for an extended period, and forced the bank employees, under threat of harming their families, to travel to the bank with them to withdraw funds. See, *e.g.*, *United States* v. *McCraw*, 1992 U.S. App. LEXIS 7111, at *1-4 (9th Cir. Apr. 9, 1992) (listing factual background, without analyzing application of § 2113(e)); *United States* v. *Smith*, 320 F.3d 647, 650-52 (6th Cir. 2003) (similar). In contrast, under the same statutory provision, conduct incidental to a routine bank robbery, such as moving a teller a small amount to gain entry to a credit union, has triggered punishment under § 2113(e). See, *e.g.*, *United States* v. *Carr*, 2014 U.S. App. LEXIS 14985, at *23-24 (9th Cir. Aug. 4, 2014) (upholding forced accompaniment conviction where defendant "shoved [teller] and forced her back into the credit union trailer after she managed to push her way outside").

To be sure, punishing conduct of varying degrees under the same statutory provision is not unusual. Here, however, such a wide swath of punishable (and not punishable) conduct stems from inherent ambiguity in the phrase "forces any person to accompany him." Such language connotes many different forms of hostage-taking. But because Congress left no specific record of its intention to punish an even wider range of conduct that would also include mere movement of persons from room to room during a robbery or an escape, lenity counsels in favor of a more narrow reading. See *Bass*, 404 U.S. at 348 (stating that lenity "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should'" (quoting *H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks* 196, 209 (1967))).

### B. The Statute's Ambiguity Increases The Risk Of Inconsistent Application

The myriad of conflicting interpretations in the lower courts produces asymmetric punishments for the same conduct. The general bank robbery statute, § 2113(a), provides no statutory minimum and a maximum of twenty years imprisonment for bank robbery. Section 2113(e) thus specifies an aggravated version of the more general crime. As a result, defendants in the Fourth and the Eleventh Circuits, where forced accompaniment encompasses even slight movement of a victim, are more frequently faced with enhanced statutory penalties than defendants in the Tenth Circuit, where forced accompaniment requires substantially more movement.

Such arbitrary results are particularly problematic where a vague statutory phrase provides the basis for a very substantial mandatory minimum sentence. The constitutional principles supporting the rule of lenity—fair notice and separation of powers—suggest the rule should be applied rigorously to such statutes, especially where findings of ineligibility do not absolve the defendant of the underlying crime. See *Dean* v. *United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting) ("[I]nterpretive asymmetries give the rule of lenity special force in the context of mandatory minimum provisions."); see also Brief for Families Against Mandatory Minimums as Amicus Curiae Supporting Petitioner at 6-15, *Burrage* v. *United States*, 134 S. Ct. 881 (2014) (No. 12-7515) (describing rationale for rigorous application of rule of lenity to mandatory minimum sentencing statutes). In light of the severe punishment Congress mandated for forced accompaniment, the Court should not interpret the phrase "so as to increase the penalty when such an interpretation can be based on

no more than a guess as to what Congress intended." *Granderson*, 511 U.S. at 42-43 (internal quotation marks and alterations omitted) (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980)).

### C. Section 2113(e) Requires Substantial Movement

Given the ambiguity of the forced accompaniment provision, § 2113(e) should be read to require substantial movement of the victim. Faced with several competing interpretations—*de minimis* movement, more than *de minimis* but less than substantial movement, and substantial movement—lenity counsels in favor of adopting the most narrow. See *Bell* v. *United States*, 349 U.S. 81, 83 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

Applying this standard here, no reasonable factfinder could find that the movement of the victim in this case was "substantial." The petitioner accompanied Mrs. Parnell no more than nine feet, within her own home, for a brief period. J.A. 65a, 81a. Indeed, it is difficult to imagine the course of a bank robbery that does not, at some point, involve the forced movement of individuals in some respect, including from room to room, thereby enhancing the risk of asymmetrical punishments for similar conduct across different jurisdictions.

## II. THE COURT SHOULD ADOPT A CLEAR RULE FOR INTERPRETING THE FORCED ACCOMPANIMENT PROVISION OF § 2113(e)

For the reasons stated above, forced accompaniment requires substantial movement of the victim, and given the extremely *de minimis* movement in

this case, petitioner's § 2113(e) conviction should be overturned. The specificity of the test advocated here draws support from the Court's precedents, especially where mandatory minimums are involved, see, *e.g.*, *Burrage*, 134 S. Ct. at 891, and finds appropriate references in the statutory history and in the Model Penal Code's discussion of kidnapping,[4] see M.P.C. § 212.1.

### A. Specific Rules Are Especially Important In Applying Vague Mandatory Minimum Statutes

"Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute." *James* v. *United States*, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting) (stating that "[i]f we are not going to deny effect to this statute as being impermissibly vague . . . , we have the responsibility to derive from the text rules of application that will provide notice of what is covered and prevent arbitrary or discriminatory sentencing"). The reasons for adopting a narrow rule for interpreting this statute mirror the reasons for rigorous application of the rule of lenity to statutes mandating minimum sentences. That is, providing further clarity to the forced accompaniment provision, even beyond holding that it requires substantial movement of the victim, would not only provide clear notice to criminal defendants of the type of conduct proscribed, but it would also prevent inconsistent application of the severe penalties mandated by the statute. Cf. *United States* v. *Lanier*, 520

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[4] The Model Penal Code was written after the federal bank robbery statute was enacted in 1934, and Congress thus did not intend its definition of kidnapping to be incorporated into the statute. The Code, however, provides useful guidance here, as the drafters addressed analogous issues to those presented by § 2113(e).

U.S. 259, 266 (1997) ("[R]ule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct *clearly* covered." (emphasis added)).

1. Fair notice of the conduct proscribed by a criminal statute is essential, especially where a severe restriction on individual liberty is mandated. Cf. *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974) (stating that lenity is rooted in the "belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property"). Here, under § 2113(e), a penalty range of a mandatory minimum of ten years to a maximum of life imprisonment is tied to a single factual determination, a determination that turns on six words of an imprecisely-phrased statute.

Although those six words must be interpreted in favor of the defendant, elaboration on what conduct constitutes "substantial movement" is helpful. Cf. *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (stating, in applying rule of lenity, "[t]o make the warning fair, so far as possible the line should be clear"). Such clarity is not only important to the potential criminal *before* a crime is committed, but even more so to the criminal defendant *after* a crime is committed, when contemplating the likelihood of conviction and the terms of a plea offer. See *id.* ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand . . . .").

2. Clarification of "the line" delimiting the scope of § 2113(e)'s forced accompaniment provision would help prevent arbitrary application of the statute, a particular concern with mandatory minimum sen-

tences. See *supra* Section I. By their nature, mandatory minimums shift the traditional balance of powers in the criminal justice system. In doing so, they restrict the sentencing judge's discretion to tailor criminal punishment to the particular circumstances of the crime and to the particular defendant. See 18 U.S.C. § 3553(a) (stating that "[t]he court shall impose a sentence sufficient, but not greater than necessary"). At the same time, mandatory minimums shift the sentencing judge's discretionary authority to the prosecutor, whose charging decisions affect not only the charges a defendant will face at trial, but also a defendant's willingness to plead guilty (and the substance of his plea) before trial. See Barbara S. Vincent & Paul J. Hofer, Federal Judicial Center, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 21 (1994)[5] ("The transfer of discretion from neutral judges to adversarial prosecutors tilts the sentencing system toward prosecution priorities, sometimes at the expense of other sentencing goals.").

Without statutory clarity, prosecutors have unrestrained discretion in their charging decisions under the bank robbery statute, which may ultimately lead to inconsistencies in sentencing. See United States Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 345-46 (Oct. 2011)[6] (finding that "different charging and plea practices have developed in various districts that result in the disparate applica-

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[5] *Available at* http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf.

[6] *Available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf.

tion of certain mandatory minimum penalties"). Such inconsistent results undermine "sentencing proportionality—a key element of sentencing fairness . . . ." *Harris* v. *United States*, 536 U.S. 545, 571 (2002) (Breyer, J., concurring in part and concurring in the judgment), *overruled by Alleyne* v. *United States*, 133 S. Ct. 2151 (2013). Moreover, these inconsistencies upset uniformity in sentencing, a primary purpose of mandatory sentencing schemes. See United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 89 (Nov. 2004)[7] ("Research over the past fifteen years has consistently found that mandatory penalty statutes are used inconsistently in cases in which they appear to apply.").

3. The rule this Court adopts should be narrow. Although a narrow rule might not encompass all aggravating conduct contemplated by the statute, the societal costs of imposing a possibly under-inclusive rule are slight because the sentencing court has discretion to increase a sentence under § 3553(a). Cf. *Dean*, 556 U.S. at 584 (Breyer, J., dissenting) ("[I]n the case of a mandatory minimum, an interpretation that errs on the side of *exclusion* . . . still *permits* the sentencing judge to impose a sentence similar to, perhaps close to, the statutory sentence even if that sentence . . . is not legislatively *required*."). For example, under the discretionary Sentencing Guidelines for robbery, the judge may impose a four-level

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[7] *Available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

increase "[i]f any person was abducted[8] to facilitate commission of the offense or to facilitate escape" and a two-level increase "if any person was physically restrained to facilitate commission of the offense or to facilitate escape . . . ." U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(A)-(B) (2013). For conduct falling in a gray area (that is, outside the confines of the Court's narrow statutory interpretation) the Guidelines provide for a more nuanced, judicial approach to punishment, ensuring that the harsh, legislatively-mandated punishment is applied only to "conduct clearly covered" by the statute. See *Lanier*, 520 U.S. at 266.

In addition, a too narrow interpretation of the statute can be more easily corrected through the legislative process. Those who may suffer from an under-inclusive interpretation (law enforcement) have far greater access to Congress than those who may suffer from an over-inclusive interpretation (criminal defendants). See *Santos*, 553 U.S. at 514 (stating that the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

In contrast, the societal costs of a broad, over-inclusive rule are high. Cf. *Dean*, 556 U.S. at 585 (Breyer, J., dissenting) ("[A]n interpretation that errs on the side of *inclusion* . . . , by erroneously taking discretion away from the sentencing judge, would ensure results that depart dramatically from those Congress would have intended."). Such a rule would

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[8] Under the Sentencing Guidelines, "'Abducted' means that a victim was forced to accompany an offender to a different location." U.S. Sentencing Guidelines Manual § 1B1.1 cmt. n.1(A) (2013).

further limit judicial discretion at the expense of a corresponding increase in prosecutorial discretion and pressure for guilty pleas. See Anthony M. Kennedy, Address at the American Bar Association Annual Meeting 5 (Aug. 9, 2003)[9] (stating that mandatory minimums "give[] the decision to an assistant prosecutor not trained in the exercise of discretion and take[] discretion from the trial judge . . . the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way").

### B. The Conflicting Tests Used By Lower Courts To Interpret § 2113(e) Are Inadequate

Lower courts have implemented a number of possible tests to aid in interpreting § 2113(e). Each of these conflicting tests is inadequate.

1. As discussed *supra* in Section I, at least two circuits, the Fourth and the Eleventh, appear to consider even *de minimis* movement of a victim to trigger the enhanced penalties of § 2113(e)'s forced accompaniment provision. See, *e.g.*, *Turner*, 389 F.3d at 119-20; *Bauer*, 956 F.2d at 241. But the *de minimis* test should be rejected out of hand. This test is both over-inclusive, see Br. Pet'r 31-34 (discussing "absurd results" produced by *de minimis* interpretation) and incompatible with the result dictated by the rule of lenity (*i.e.*, that § 2113(e) requires substantial movement of a victim), see *supra* Section I.

2. As an alternative to the *de minimis* test, other courts have found that a bank robber's forcing a vic-

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[9] *Available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf.

tim to cross the threshold of a building was sufficient[10] evidence to trigger the forced accompaniment enhancement. See, *e.g.*, *United States* v. *Davis*, 48 F.3d 277, 279 (7th Cir. 1995) ("Clearly, the phrase 'forces any persons to accompany him without . . . consent' encompasses forcing someone outside a building to enter the building."); *United States* v. *Reed*, 26 F.3d 523, 528 (5th Cir. 1994) ("[M]oving the victim as a hostage into the bank is an accompaniment, just as moving her out of the bank as a hostage would have been an accompaniment . . . ."). But a solely threshold-based test must also be rejected, as this test is both over- and under-inclusive.

Like the *de minimis* test, the threshold test could arbitrarily make conduct incidental to a routine bank robbery subject to § 2113(e)'s increased penalties, producing results contrary to Congress's graduated penalty scheme.[11] In a strict application of the threshold test, if the hypothetical bank robber, in pushing the security guard aside, happens to force the security guard to take one step inside the bank with him, his conduct will be subject to the ten-year mandatory minimum in § 2113(e). But if the shoved security guard's foot never crosses that threshold, the

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[10] Entering or exiting the building was deemed a *sufficient* condition for applying the enhanced penalty in each of these cases. Neither court elaborated on whether crossing the threshold was a *necessary* condition for finding forced accompaniment under § 2113(e).

[11] The *Reed* court was cognizant of the danger of an overbroad interpretation of § 2113(e), at least for movement solely within the bank. *See Reed*, 26 F.3d at 528 ("To conclude [robber-orchestrated movement within the bank] an aggravating accompaniment would likely convert numerous ordinary . . . bank robberies to aggravated bank robberies with only the faintest of distinctions between accompanied, *i.e.*, aggravated, and non-accompanied, non-aggravated bank robbers.").

bank robber's conduct will be punishable as a routine bank robbery under § 2113(a) and subject to no mandatory minimum.

On the other hand, the threshold test may also fail to capture truly aggravating conduct. A bank robber could, for example, force a bank customer in the parking lot to walk with him to a safe location, using that customer as a human shield against efforts of law enforcement to capture him. Because the customer never entered or exited a building (or even a vehicle) with the robber, under the threshold test, the robber's conduct will not be subject to § 2113(e)'s enhanced penalties. Although an under-inclusive test is preferable to an over-inclusive test, see *supra* Section II.A.3, the threshold test draws a particularly arbitrary line—unconnected to the history and purpose of the statute, see Br. Pet'r 27-30—and one this Court should not adopt.

3. To combat against such arbitrary results, still other judges have used, or advocated using, an over-inclusive and unwieldy three-part balancing test to interpret the forced accompaniment provision.[12] See *United States* v. *Sanchez*, 782 F. Supp. 94, 97 (C.D. Cal. 1992). In *Sanchez*, after first finding that "[k]idnapping under § 2113(e) requires asportation of the victim that is not insubstantial," the court elaborated further:

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[12] This test has not been adopted by any other court and was rejected by the majority in *United States* v. *Strobehn*, 421 F.3d at 1019-20. In *Strobehn*, Judge Fletcher used the *Sanchez* test to vigorously dissent against the majority's finding that a defendant who forced a security guard to enter a bank and lie on the floor during a 45-second bank robbery was properly convicted under the forced accompaniment provision. *Id.* at 1026-27 (Fletcher, J., dissenting).

> The substantiality of the asportation, although there can be no bright line, should be measured by duration, distance and any change in environment tending to increase the danger to which the victim is exposed, other than any danger inherent in the underlying offense.

782 F. Supp. at 97 (footnotes omitted).

Like the *de minimis* and the threshold tests, the multi-factor *Sanchez* test is over-inclusive in that it includes conduct that Congress did not speak to in the statutory text. Although the plain meaning of the term "accompany" connotes some *distance*, see Br. Pet'r 15-19, the law makes no mention of *duration* and no mention of *danger*, the remaining two factors in the *Sanchez* balancing test.

Certainly, if Congress had wanted § 2113(e) to focus on danger, it knew how do to so. See *United States* v. *Wiltberger*, 18 U.S. 76, 96 (1820) (cautioning against "departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest"). Instead, Congress included danger as an element in § 2113(d), by increasing the statutory penalties when the bank robber "puts in jeopardy the life of any person by the use of a dangerous weapon or device." Reading § 2113(e) to likewise include a danger analysis contradicts Congress's graduated penalty scheme, creating an absurd result. That is; § 2113(d) would provide one set of penalties if the bank robber endangers someone by the use of a dangerous weapon or device, while § 2113(e) would provide much more serious penalties if the bank robber endangers someone regardless of the presence of such device. In providing clarity, this Court should not give effect to such an absurd result. See *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a

statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Moreover, unlike the simplicity of the *de minimis* and the threshold tests, the *Sanchez* test may not, in fact, provide the clarity this statute needs. In an already dangerous situation, assessing whether the robber somehow enhanced risk might prove difficult. For example, even ordering bank patrons to lie on the floor might be seen as either enhancing risk (*e.g.*, through trampling or other physical injury) or as reducing risk (*e.g.*, because those on the floor might avoid flying bullets). The same can be said of ordering bank personnel into a room or a vault. Further, the scope and duration of any increased risk or danger could also prove vexing—as when a bank robber briefly ducks behind a large patron when the police have drawn weapons outside the bank window. Accordingly, adopting the *Sanchez* test merely invites new ambiguity into an already murky statute.

### C. In Interpreting The Statute, The Court Should Rely On The Distinction For Kidnapping Already Drawn In The Model Penal Code

Because none of the alternative tests discussed above are adequate, amicus respectfully suggest the Court look to the Model Penal Code. See M.P.C. § 212.1 (definition of "kidnapping"). Consistent with that section, the Court should hold that forced accompaniment under § 2113(e) requires the bank robber to "unlawfully remove[] another from his place of residence or business, or a substantial distance from the vicinity where he is found . . . ."[13]

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[13] The Model Penal Code has an alternative definition for kidnapping where the defendant "unlawfully confines another for a

1. This rule is apt because the drafters of the Model Penal Code faced similar line-drawing problems to those presented by the forced accompaniment provision of § 2113(e). To address the "[m]any prior kidnapping statutes [that] combined severe sanctions with extraordinarily broad coverage," the drafters purposefully drew clear distinctions between kidnapping, felonious restraint, and false imprisonment. M.P.C. § 212 intro. note. In explaining their choice of words for the kidnapping provision (the most egregious of the three offenses), the drafters stated that "[b]y using the word 'vicinity' rather than 'place' and by speaking only of 'substantial' removal, the provision precludes kidnapping convictions based on trivial changes of location having no bearing on the evil at hand." M.P.C. § 212.1 cmt. 3.

The M.P.C. test, in making this meaningful distinction, would similarly give effect to Congress's graduated penalty scheme here. That is, applied to § 2113(e), the M.P.C. test separates conduct incidental to the crime itself (*e.g.*, directing a teller to the vault) from conduct that is truly egregious and extraordinary (*e.g.*, taking the teller hostage in the getaway car), and correspondingly worthy of Congress's enhanced punishment. See M.P.C. § 212.1 cmt. 3. ("This phrasing of the asportation requirement eliminates the absurdity of liability for kidnapping where a robber forces his victim into his own home or into the back of a store in order to retrieve valuables located there.").

2. The M.P.C. test has support in the history of the statute, suggesting that it more closely approxi-

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substantial period in a place of isolation" with any of four enumerated purposes in mind. M.P.C. § 212.1. This alternative definition is not instructive here because the term "accompany" in § 2113(e) signifies behavior beyond mere confinement.

mates Congress's intent than other possible bright-line or multi-factor tests. Both the Senate and the House reports, in referencing the provision that was to become § 2113(e), use the word "kidnapping."[14] See S. Rep. No. 73-537 (1934) (incorporating memorandum from Department of Justice stating that "[a] heavy penalty is imposed on anyone who commits a homicide or kidnaping [*sic.*] in the course of such unlawful act"); H.R. Rep. No. 73-1461 (1934) (stating that "[i]f murder or kidnaping [*sic.*] be committed in connection therewith the penalty shall be imprisonment from 10 years to life, or death if the jury shall so direct in the verdict"). And, under the contemporary understanding of "kidnapping," significant asportation of the victim was required. See *Marx*, 485 F.2d at 1186 (analogizing forced accompaniment provision to common law kidnapping, which required "tak[ing] and carry[ing] away any person by force and against his will" and federal kidnapping, which requires interstate transportation); see also Br. Pet'r 30 (summarizing common understanding of kidnapping at time of statute's enactment).

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[14] Numerous courts, including this one, have referenced kidnapping when discussing the forced accompaniment provision of § 2113(e). *See, e.g., United States* v. *Tate*, 377 U.S. 463, 464 (1964) (characterizing charge under § 2113(e) as "kidnap[p]ing in connection with the robbery"); *see also Strobehn*, 421 F.3d at 1022-23 (Fletcher, J., dissenting) (collecting cases). The United States Attorneys' Manual also refers to § 2113(e)'s proscriptions against "forcibly abduct[ing]" or "killing and kidnapping" during a bank robbery or escape therefrom. U.S. Dep't of Justice, *Criminal Resource Manual in U.S. Attorneys' Manual* § 1349, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01349.htm; *id.* at § 1354, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01354.htm.

3. The M.P.C. test is superior to possible alternative tests for interpreting forced accompaniment. First, in incorporating the substantial movement requirement, this distinction gives the statute the appropriate narrow reading. See *supra* Section I; see also M.P.C. § 212.1 (requiring the prosecution to prove that the defendant "unlawfully remove[d] another from his place of residence or business, or a *substantial* distance from the vicinity where he [was] found" (emphasis added)).

Second, the M.P.C. test best strikes the balance of being neither over- nor under-inclusive. In including only substantial movement, and thereby excluding *de minimis* movement or insignificant threshold crossings, the M.P.C. test captures only truly aggravating (and not arbitrary) conduct. Under this test, the hypothetical bank robber who pushes the security guard slightly into the bank to gain entry would not be subject to § 2113(e)'s mandatory minimum.

Further, unlike the threshold test, the M.P.C. test would also capture truly egregious acts committed entirely outside the bank or outside the victim's home. See M.P.C. § 212.1 cmt. 3 (stating that substantial distance test governs "situations in which the victim is seized elsewhere than in his residence or place of business"). For example, under the M.P.C. test, the hypothetical bank robber who forces the customer in the parking lot to walk with him to a safe location, using that customer as a human shield, could be found to have moved the victim "a substantial distance from the vicinity where he [was] found," thus subjecting the robber to the enhanced penalties of § 2113(e). See M.P.C. § 212.1.

Finally, the rule provides the clarity in application that the *Sanchez* multi-factor test lacks. The bank robber has either forced the victim to leave his home

or his business, or he has not. He has either forced the victim to move a substantial distance from the vicinity where he is found, or he has not. By focusing on distance, the M.P.C. test avoids the *Sanchez* test's unpredictable balancing of harms and the corresponding possibility of inconsistent application.

### D. Under The M.P.C. Test, The Petitioner's § 2113(e) Conviction Should Be Reversed

Using the M.P.C. test as a guide, no reasonable factfinder could conclude that Mr. Whitfield forced Mrs. Parnell to accompany him in violation of § 2113(e). Mr. Whitfield did not "unlawfully remove [Mrs. Parnell] from [her] place of residence," see M.P.C. § 212.1, rather his interaction with Mrs. Parnell took place entirely within the walls of her home.

Movement within a victim's residence—conduct incidental to the underlying offense—is the type of conduct the M.P.C. drafters sought to distinguish from substantial asportation—movement that necessitates a more serious kidnapping (or forced accompaniment) charge. See M.P.C. § 212.1 cmt. 3. Because the asportation here was not substantial, and because it took place entirely within Mrs. Parnell's home, Mr. Whitfield's § 2113(e) conviction should be reversed.

## CONCLUSION

For the foregoing reasons, petitioner's § 2113(e) conviction should be reversed and the remaining counts remanded for resentencing.

Respectfully submitted,

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